MULLA

HINDU LAW

by

Sir Dinshaw Fardunji Mulla

23rd Edition

Satyajeet A Desai

LexisNexis

First Edition	1912
Second Edition	1915
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Sixteenth Edition	1990
Seventeenth Edition	1998
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Ninteenth Edition	2005
Twentieth Edition	2007
Twenty-first Edition	2010
—First Reprint (March)	2011
—Second Reprint (December)	2011
—Third Reprint (April)	2012
—Fourth Reprint (October)	2012
—Updated Edition (February)	2013
—First Reprint (February)	2014
—Second Reprint (January)	2015
—Third Reprint (May)	2015
—Fourth Reprint (August)	2015
Twenty-Second Edition	2016
—First Reprint (November)	2016
—Second Reprint (March)	2017
—Third Reprint (June)	2017
Twenty-Third Edition	2018
— Reprint	2019
— Reprint	2019
— Reprint	2019
— Reprint	2019
— Reprint	2020
— Reprint	**2021**

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Gurgaon–122002, Haryana, India.
Tel: + 91 124 4774444 Fax: + 91 124 4774100
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Mulla, Hindu Law, 23rd Edition

ISBN: 978-93-86515-17-9

Printed by: Sanat Printers.

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INTRODUCTION

Wherever the laws of India admit the operation of a personal law, the rights and obligations of a Hindu are determined by Hindu law, i.e., his traditional law, sometimes called the law of his religion, subject to the exception that any part of that law may be modified or abrogated by statute. Hindu law, as it is generally agreed, has the most ancient pedigree of any known system of jurisprudence. The study of any developed legal system requires a critical and analytical examination of its fundamental elements and conceptions, as also the practical and concrete details, which go to make the contents or body of that law. It also requires consideration of the line of development it has pursued. The abstraction and exposition of the principles or distinctions necessarily involved in Hindu law and the consideration of the line of development which it has pursued, are the appropriate matters of jurisprudence and legal history. The concrete legal system, which deals with the contents or body of Hindu law, is a matter of positive law and the questions that arise for consideration at the outset are: What is Hindu law? What are the sources from which knowledge of Hindu law must be derived?

Dharma.

Law as understood by the Hindus is a branch of *dharma*. Its ancient framework is the law of the *Smritis*. The *Smritis* are institutes, which enounce rules of *dharma*. The traditional definition of *Dharma* is: 'what is followed by those learned in the *Vedas* and what is approved by the conscience of the virtuous who are exempt from hatred and inordinate affection'.[1] *Dharma* is an expression of wide import and means the aggregate of duties and obligations—religious, moral, social and legal.[2] In Sanskrit, there is no term *strictissimi juris* for positive or municipal law, dissociated from the ethical and religious sense. In a system of law necessarily influenced by the theological tenets of the *Vedic* Aryans, and the philosophical theories which the genius of the race produced, and founded on the social and sociological concepts of a pastoral people, the admixture of religion and ethics with legal precepts was naturally congruent. It was not possible, indeed, always to draw any hard line of logical demarcation between secular and religious matter, because certain questions, for instance, such as marriage and adoption, had the aspects of both. Any attempt, therefore, to isolate completely, any secular matter from its religious adjuncts, would fail to give a comprehensive idea or proper perspective of the true juridical concepts of Hindu law.

Secular Law and Religious Ordinances.

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1 *Manusmriti,* II, 1. *Medhatithi*, one of the earliest commentators on *Manusmriti* explains the term '*dharma*' as duty—*Dharmashabdah Kartavyata vachanah,* VII, 1. For *Medhatithi*, see p 26.

2 See also *Ulpian's statement of the Commandments of the law*, containing a broad summary of a lawful man's duties, preserved in the introductory chapter of Justinian's Instituties: '*Juris precepta sunt haec—Honeste vivere, alterum non laedere, suum cuique tribuere*'—Commandments of the law: To live honestly; not to injure anyone: to give every man his due.

Smritis : the basic structure.

Where not modified or abrogated by legislation, Hindu law may be described to be the ancient law of the Hindus rooted in the *Vedas* and enounced in the *Smritis* as explained and enlarged in recognised commentaries and digests and as supplemented and varied by approved usage. Its basic structure was the law of the *Smritis* and it was from time to time supplemented and varied by usage. That was its early character. Then it made remarkable progress during the post-*Smriti* period (commencing with about the seventh century AD), when a number of explanatory and critical commentaries and digests (*nibandhas*) were written on it and which had the effect of enlarging and consolidating the law. A body of law so developed bears upon it many marks of its origins. Unfortunately, many ancient works on law are not available in their integrity and a number of them are probably irretrievably lost. However, historical research by Orientalists, both European and Indian, during last hundred years has brought to light a wealth of variegated material that had contributed to the growth of this ancient system of law.

Legal literature.

Smritis in part based on immemorial customs.

The ancient law promulgated in the *Smritis* was essentially traditional, and the injunction was that time-honoured institutions and immemorial customs should be preserved intact. The law was not to be found merely in the texts of the *Smritis* but also in the practices and usage which had prevailed under it. The traditional law was itself grounded on immemorial custom[3] and provided for inclusion of proved custom, i.e., practices and usages that from time to time might come to be followed and accepted by the people.[4] The importance attached to the law-creating efficacy of custom in Hindu jurisprudence was so great that the exponents of law were unanimous in accepting custom as a constituent part of law.

Era of Legislation.

It would be pertinent here to note one or two matters of more practical importance. The last century and a half of judicial decisions has, though not in theory but in effect, remodelled on many points on both textual and customary law. Many of the important points of Hindu law are not to be found in the law reports.

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3 *Manusmriti* states: 'Here the sacred law has been fully stated...and also the traditional practices and usages of the four *varnas*'—I, 107. A popular verse from the *Mahabharata* is: '*Dharma* has its origin in good practices and *Vedas* are established in *Dharma*'—*Achara sambhavo dharmo dharme vedah pratishthitah—Vana parva,* 150 Chapter 27. Vasishtha observes: 'Manu has declared that the (peculiar) practices and usages of countries, castes and families may be followed in the absence of rules of revealed texts'—1, 17 (*SBE*, Volume XVI).

4 *Athatah samayacharikan dharman vyakhyasyamah*—We shall now propound the acts productive of merit (obligations) which are sanctioned by tradition and current usage—*Apastamba Dharmasutra*, 1, 1.1.1. Haradatta explains this by stating: *Samayacharikah paurisheyi vyavastha*—current practices and conventions of the people. For Apastamba, see later part of the discussion.

Moreover, material and substantial changes and modifications in the law have been brought about by a number of enactments, which aim to ensure a uniform civil code of personal law for Hindus in the whole country. The changes, no doubt radical, proceed in the principle of equality stressed in the Constitution for evolving a just social order after taking due note of existing conditions and ideas. Of those enactments, it will suffice here to draw attention to The Hindu Marriage Act, 1955 and The Hindu Succession Act, 1956. The outstanding feature of the changes effected in the law of marriage is that monogamy is the rule, and dissolution of marriage is permissible in certain cases. The alterations made in the law by the latter enactment are that in effect it eliminates all disparity in the rights of men and women in matters of succession and inheritance. These enactments, from their very nature, cannot be and are not (except on few matters expressly so stated) retroactive in their operation and even in matters where they apply retrospectively, it will become necessary to know the law as it previously existed. Besides, even now a part of Hindu law and usage, as has hitherto been applicable, remains unabrogated by statute and the importance and necessity of a study of the entire system cannot be minimised of this hereafter.[5]

Sources of Hindu Law.

The sources from which knowledge of Hindu law is to be derived are the indices of *dharma* have been stated by Hindu jurisprudents. The *Veda*, the *Smriti*, the approved usage, and what is agreeable to good conscience are according to Manu,[6] the highest authority on this law, the quadruple direct evidence (sources) of *dharma*. Law did not derive its sanction from any temporal power; the sanction was contained in itself. The *Smritikars* and those who preceded them declared and emphasised the divine origin and sanction of the rules of *dharma*. 'Since law is the king of kings, far more powerful and rigid than they, nothing can be mightier than the law by whose aid, as by that of the highest monarch, even the weak may prevail over the strong...'[7] The minutest rules were laid down for the guidance of the king. It was his duty to uphold the law and he was as much subject to law as any other person. He did not claim to be the lawmaker; he only enforced law. One of his chief duties was described to be the administration of justice according to the local usage and to written Codes.[8] It was obligatory on him not only to enforce the sacred law of the texts, but to make authoritative the customary laws of the subjects as they were stated to be. These included customs of

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5 See p 76; introductory notes to the two enactments.

6 *Manusmriti*, II, 12. The variant text of Yajnavalkya adds one more source 'desire sprung from due deliberation'. see p 22.

7 *Shatapatha Brahmana*, XIV, 4.2.26—*Tadetat Kshatrasya Kashatram yad Dharmah tasmat Dharmatparannasti athovaleeyanna-valeeyan samashante dharmena.*

8 *Gautama*, XI, 19, 20 (*SBE* Volume II); *Manusmriti*, VIII, 41, 46.

countries, districts, castes and families. So also of traders, guilds, herdsmen, moneylenders and artisans, for their respective classes.[9]

Shruti.

It was an article of belief with the ancient Hindu, that his law was revelation, immutable and eternal. *Shruti*, which strictly means the *Vedas*, was in theory the root and original source of *dharma*.[10] It was the fountainhead of his law. *Shruti* means, literally, that which was heard. It was supreme to the early Hindu like the *Decalogue* to the later Christian. The *Vedas*,[11] however, do not contain much that alludes to positive or municipal law.

Smriti.

The few statements of law that are to be found in the *Vedas* are mostly incidental. *Smriti* literally means recollection. The *Shruti* was accepted as the original utterings of the great power. The *Smritis*, though accepted as precepts emanating from that source, were couched in the words of the *rishis* or sages of antiquity, who saw or received the revelations and proclaimed their recollections.[12]

The authority of these two primordial sources is described by Manu:

> By Shruti, or what was heard from above, is meant the *Veda*. By *Smriti*, or what was remembered from the beginning, the body of law—from these two proceeds the whole systems of duties.[13]

Theoretically, if a text of the *Smriti* conflicted with any *Vedic* text, it had to be disregarded: 'Where there is a conflict between the *Vedas* and the Smritis, the *Vedas* should prevail'.[14] However, as there was not much of positive law in the *Vedas*, an equation was established whereby the *Smritis* were understood as having been based on lost or forgotten *Shrutis*. By inflexible rule of Hindu jurisprudence, the *Smritis* were in practice never understood as in discord with *Vedas*. For all practical purposes, therefore, the *Smritis* were accepted as the effective source of Hindu law.[15]

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9 *Brihaspati*, II, 26-31 (*SBE* Volume XXXIII); *Manusmriti*, VII, 203; VIII, 41.

10 *Shrutistu vedoanjeneyo Dharmashastram tu vai Smritih*; *Manusmriti* II.10.

11 The *Vedas* comprise of: (1) *Rig Veda*, the *Veda* of the verses; (2) *Sama Veda*, the *Veda* of chant consisting of prayers composed in metre; (3) *Yajur Veda*, the *Veda* of sacrificial formulae; and (4) *Atharva Veda*, consisting inter alia of incantations, imprecatory formulae and prayers for averting calamities. The *Vedas* are of composite origin and include hymns by many generations of the early Aryans. Originally, they were transmitted orally by preceptor to disciple. The Vedic language was related to the classic Sanskrit, just as Attic was to Homeric Greek.

12 According to Blackstone, all human laws rested on the twin foundation of the law of revelation and the law of nature. The theory of Canonical law, which affected all European systems of law, was that the fundamental rules of law had been derived from a divine source. The Muslims believe a part of the Quranic law to contain the *ipsissima verba* of the divine revelation and the rest to be inspired by God, but expressed in the Prophet's own words.

13 *Manusmriti*, II, 10.

14 *Vyasa*, 1.4. *Manusmriti*, II, 13, 14.

15 The formula affirming this equivalence was critically discussed by the leading *mimansakars*, and particularly by Kumarila. The practical summation of Kumarila in his *Tantra-Vartika* is—*Tena sarvasmritinam prayojanavatee prama-nyasiddhih*.

Three stages of the legal literature.

Considered chronologically, and having regard to the stage of its legal literature, the Hindu law falls under three main epochs:

(i) the *Vedic* epoch. This is also referred to as the pre-*Sutra* period;

(ii) the era of the *Dharmashastras*. This is often sub-divided into:

(a) the Smriti period;

(b) the Sutra *period;*

(iii) the post-*Smriti* period.

Vedic or pre-*Sutra* period.

The fixation of the chronology of the *Vedic* period is a matter about which it is indeed difficult to say anything definite. The authentic history of this period of Hindu civilisation has not been preserved. The philosophic doctrines of the ancient Hindus did not encourage any desire to leave historical records for posterity, and the Aryans or Indo-Aryans did not preserve any evidence comparable to the Tablets of the Babylonians or the Papyrii of the Egyptians; nor have we anything comparable to the Annals of Livy. There has been considerable diversity of opinion amongst the Western and many Indian scholars on the question of the chronology of the *Vedic* or pre-*Sutra* period. The former have given later dates, while the latter have accepted much earlier dates. After the archaeological discoveries at Mohenjodaro and Harappa, and the recent discoveries at Lothal and Rangpur and in the southern Narmada valley, some added support has been lent to the opinion of scholars who had assigned a hoary antiquity to the Rig-*Vedic* age. It is not difficult now to accept the view expressed by many Indian jurists and scholars that the age of the *Vedic Samhitas* and other works of the pre-*Sutra* period was approximately 4000-1000 BC. It is possible that some *Vedic* hymns may have been composed at a period earlier than 4000 BC.[16]

Vedas.

The *Vedas* were the outpourings of the Aryans as they streamed into the rich lands of the Punjab and the Doab from their ancient home beyond the Hindu Kush Mountains.[17] Totalitarian claims apart, it is now established history that those early Aryans were a vigorous and unsophisticated people full of the joy of life, and though not given to much intellectual broodings—the era of the *Yoga* system of philosophy of cordial harmony between God and man was yet to come—had behind them ages of civilised existence and thought. The dedication in *Rig Veda* appropriately states: 'To the seers, our ancestors, the first

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16 Mahamahopadhyaya Kane, *History of Dharmashastra* Volume II, Pt I, p XI. In the opinion of Sri BG Tilak, 'the traditions recorded in the *Rigveda* unmistakably point to a period not later than 4000 BC when the vernal equinox was in Orion'. The same view was expressed by Jacobi.

17 In a conglomeration of what may seem stereotyped bucolic hymnology, there are to be found some natural outpourings of the heart in language which is sheer lyrical poetry: *Ritasya jihva pavate madhuah* Rig IX, 75:2. One prayer is: 'Lord, be near us, hearken to us and make our speech truthful'. Rig. I.82: I. 'O Faith, endow us with belief'.

pathfinders'. Those early Aryans primarily invoked the law of divine wisdom, by which according to their theological conceptions, all things in heaven and in earth are governed. Their appeal was to the divine law and the universal order[18] to judge of their rectitude or obliquity. This was natural law or the law of reason; the unwritten law. Then came to be stressed the conventional and customary law, which a body of rules dealing with the right, the wrong, rights and duties and obligations as established and accepted by the people for themselves but with greater stress on duties and obligations. There is intrinsic evidence in the *Shrutis* that those Aryans of the *Vedic* age had robust concepts of a lawful man's duties. The emphasis was on the practice of *dharma*, an expression which came to signify 'the privileges, duties and obligations of a man, is standard of conduct as a member of Aryan community, as a member of one of the castes and as a person in a particular state of life'.[19]

Vedas, primordial source.

Although, the Hindus appeal to the *Shrutis* as the primary source of their law and religion, the *Shrutis* do not contain much that can be regarded as positive or lawyers' law. The references on these to secular law are mingled with matters ethical and religious and direct statements of law are rather few. A number of rules of law to be found there are incidental and at time metaphorical. The existing *Dharmashastras* belong to the second period. However, we find references in the *Dharmashastras* to previously existing laws and customs. It is obvious that for many centuries, there existed *Gathas* which are mentioned in the *Manusmriti* and the *Sutras* of Gautama, Vasishtha and others, but of the original form of those *Gathas* we know very little. The *Smritikars* are agreed and common traditions have always accepted that the earliest exponent of law was Manu. The *Smritis* purport to embody one traditional law, namely the pronouncements of Manu.[20] The *Rig Veda* enjoins observance of the ancient rules of Manu: 'Do not take us far away from the path' (rules of *dharma*) prescribed by Manu and came down to us from our thers.[21] The material of that period available to this day does not render much assistance in collating an authenticated account of that body of original law, traditionally accepted as Manu's law, which indubitably existed. It was the unsophisticated

Early Gathas.

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18 The expression chosen for the universal order and law was '*Rita*'. 'The down follows the path of *Rita*, the right path as if she knew that before. She never oversteps the regions. The sun follows the path of Rita'. See also 'He gave to the sea his decree, that the water should not pass his commandment': Proverbs 8.29. The expression '*Rita*' also came to mean the fountain of justice and the path of morality to be followed by men. One prayer was: 'O Indra, lead us on the path or *Rita*, on the right path...' *Rig Veda*, X 133:6.

19 Even when later on rights were naturally the topic of forensic discussion, the accent was on obligation rather than on rights. Curiously enough, there is no equivalent expression in Sanskrit for the word 'rights' as used by modern writers on jurisprudence.

20 See *Smriti*, Introduction to the book.

21 *Manah pathah pitrayan dooram naishta: Rig Veda*, VIII, 40: 3.

Early *Sutras*.

age during which were composed a catena of *Sutras* simple and naive, yet adequate for the purposes of a pastoral people and their corporate life. Those early *Sutras*, composed at a time when knowledge was imparted catechetically, are so far matters of legendary history and what we know of them is only from references to some of them in the extant *Dharmashastras*. Jurisprudence in the *Vedic* age was nascent and creative. There is ancient literature reflecting the continued cultural existence of many centuries during the *Vedic* period, but we do not have that abundant data requisite for the purposes of the history of that epoch and we know much less of its legal history. The initial difficulty has been the lack of any genuine works of historiography and no historical survey of that first epoch of legal literature has so far been accomplished. There is, however, reliable data of a long period of transition between the first epoch and the era of the *Dharmashastras*. The *Brahmanas*,[22] which form the second part of the *Vedas*, and deal with rituals, and sacrificial rites, belong to this period during which were formed numerous *Shakhas* or Schools of the *Vedas* and greater emphasis was placed on the supremacy of the *Vedas* and observance of castes and stages of life. All these and the rise in power and dominance of the priestly caste are the features of the period of transition. In the ancient Brahminical society, several groups called *Charanas* had been formed. Each of these *Charanas* had its own *Shakha* (branch) of the *Veda* and had its own ritualistic and legal codes. Every *Charana* had also *Kalpasutras,* which included the *Shrauta*, the *Grihya* and the *Dharma Sutras.*[23] The *Charanas* of the *Vedic* period were called the *Sanhita Charanas*. There were similar *Charanas* also in the *Brahmana* period that followed. After that, came the period of the *Sutra Charanas*. The *Charanavyuha*, the writings of the early *Mimansakars*, and the available *Kalpasutras* are full of references to those early works and draw attention to that mass of early literature in the form of *Grihyasutras* which states the duties and obligations of the Aryan as an individual and as a householder. During this period of priestly dominance, a good deal that was written was full of elaborate sacrificial technique and religion assumed a stereotyped form verging on syncretism. However, it was also the age of protest against that rigid formalism and the time when the older *Upanishads*[24] were composed. The bold philosophical speculations embedded in the *Brihadaranyaka* and

Period of transition.

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22 The *Brahmanas* are theological treatises in prose attached to the *Vedas*. The principal *Brahmanas* are *Aitareya*, *Shatapatha*, *Panchavimsa* and *Gopatha*. They mainly deal with rituals and efficacy of sacrifices.

23 See *Dharmasutra*, Introduction to the book.

24 The *Upanishads* are philosophical discourses described as 'ancient rhapsodies of truth' and denominated as the *Vedanta* or the concluding treatises of the *Vedas*. Schopenhauer made it clear that his philosophy was shaped by the fundamental ultimate of the *Upanishads*. He stated: 'From every sentence, deep, original and sublime thought arise... It has been the solace of my life, it will be the solace of my death'.

other early *Upanishads* are a reminder of the long journey from naturalistic polytheism to almost cabalistic ritualism and ultimately to monism. The emphasis now was on self-realisation.[25] In the field of law also there was progress. A number of *Sutra*-works written during the later part of the *Vedic* epoch dealt with legal injunctions and customs. These are quoted in Yaska's *Nirukta* a series of legal maxims in the *Sutra* style.[26] There is also a date which shows that towards the end of the *Vedic* epoch, philosophical and at times legal disputations were carried on in learned assemblies or *Parishads*. These debates were responsible for the rise and development of Schools of philosophers, principles of reasoning (dialectics) and the practice of the art of discussion. A parallel to this may be noticed in the use of the art of debate by Socrates for the purpose of eliciting the truth and in the logical treatises of Aristotle. However, of those legal disputations in the *Parishads* of the learned, no record has been preserved just as no record exists of those early *Sutra*-works from which only a few quotations are to be traced. All that is known today is that there existed in the *Vedic* Epoch, rules of Dharma traditionally regarded as promulgated by Manu and *Sutra*-works containing aphorisms on law. It would be a misnomer, therefore, to call this as even a bare outline of the legal literature of that first epoch of Hindu law.

Era of Dharmashastras.

The golden age.

In the three periods stated above are discernible successive strata of legal thought, progressive evolution and expansion and growth of a system of traditional law claiming its foundation in the law of Revelation, and having the *Smritis* as its ancient framework. The era of the *Dharmashastras* was the golden age of Hindu law. No doubt the more critical period was the post-*Smriti* period when the system became more refined and ampler, but this second was the productive period of Hindu law. It was synchronous with the age of some of the leading *Upanishads* which are instinct with a spirit of inquiry and a passion for the search of truth about the hidden meaning of things. 'Truth wins ever; not falsehood' was the favourite axiom,[27] and the famous invocation was: 'Lead me from the unreal to the real: Lead me from darkness to light: Lead me from death to immortality'.[28] The spirit of the time was naturally reflected in the aphorisms of law then promulgated and

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25 One supplication was for the removal of the veil or obstacle that hides the real. The obstacle was described in one of the most quoted of the *Upanishads* as 'The golden lid that covers the face of Truth'.

26 Yaska who is very ancient himself, quotes earlier grammarians and etymological exegetes. Manu emphasised the importance of *Nirukta*, XII, III.

27 *Satyameva jayate nanrutam.*

28 *Asato mam sadgamaya; tamaso mam jyotirgamaya; mrityor mamritamgamya.*

the influence on secular matters of the philosophical impulses and tendencies is easily discernible. However, care was taken, in laying down the minimal standards of conduct appropriate to the society that was being governed, to see that ethical judgement should not be allowed to control the operation of every rule of universal application. Even modern jurisprudence according to which the functions of law and ethics may differ does not require that laws must be ethically neutral.

The *Smriti* Period.

Nature of *Smritis*—The Hindu jurisprudence regards the *Smritis*, which are often designated as *Dharmashastras*, as constituting the foundation and important source of law. The term 'sources of law' used in many legal treatises on Hindu law and in decisions of the Privy Council is somewhat ambiguous. Possibly it was borrowed from that department of Roman law entitled *De juris fontibus*. It has in any case been found convenient and useful because in one acceptation of the term, sources of law are the earliest extant monuments of documents by which existence and purport of the body of law may be known.[29] The *Smritis* of *Dharmashastras* are the earliest extant treatises from which our knowledge of the line of development which Hindu law had pursued during the second epoch of its history is derived. Mostly in metrical redactions and in some cases both in prose and metre the *Smritis* are collections of precepts handed down by *Rishis* or sages of antiquity. Composite in their character, the principal *Smritis* blend religious, moral, social and legal duties. They contain some metaphysical speculations, matter sacramental and also ordain rules of legal rights and obligations. Ethico-religious obligations were regarded by these exponents of *Dharma* as more important than legal obligations. The *Smritikars* were not always punctilious about stressing a clear distinction between the positive or lawyers' law and moral law, but this is not to suggest that they were unmindful of this distinction. When necessary they took care to define this distinction as for instance in the case of the pious and legal obligation of a son to pay the debt of the father when the debt was not for an immoral or illegal purpose. The charge levelled by some Western scholars against the authors of the *Smritis* for a want of precision and discrimination between moral and legal maxims is unreasonable and unfounded but it is unnecessary now to take any serious notice of the same. The *Smritis* are *Dharmashastras* enouncing rules and precepts of *Dharma*, an expression understood in a broad and comprehensive sense. A clear perspective of Hindu law is not possible unless it is properly appreciated that the blending of religion and ethics with law by these juris-theologians was in a large measure the natural results of a philosophy of life which laid emphasis on the supremacy of inward life over things external.

Nature of *Smritis*.

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29 The expression used by many *Smritikars* is *'Dharmamoola'*, which is also used by Manu. *Dharmasya Lakshanam* is another expression used by Manu, which means direct evidence of *dharma*.

The acceptance by a corporate society of the connotation of duty (*Dharma*) which associated religious and ethical concepts with secular matters was bound to be projected into its codes of positive law. There are to be found, however, numerous texts in the *Smritis* illustrative of distinction between law and morality applicable to questions where it was felt necessary to emphasise any such point of distinction. The distinction when not observed was because the best rule was regarded as that which advanced *Dharma*.[30] Religious injunctions and legal precepts were at times apt to be mingled up unless the rules of logic and certain accepted canons of construction were brought in aid of the ascertainment of the distinction which nevertheless obtained.[31] It may also be observed that Yajnavalkya and some other *Smritikars* divided their treatment of subjects into three sections, *Achara, Vyavahara* and *Prayashchitta*. The first and the last relate to rules of religious observances and expiation. The early writers laid greater stress on these rules than on rules of *Vyavahara* that is of civil law. The later *Smritikars* mentioned above have treated rules of *Vyavahara* in separate sections (*Prakaranas*) and exhaustively considered rules of positive law and Narada and some *Smritikars* have compiled rules only of *Vyavahara*.[32] The shrewd practical insight of the Hindu *Rishis*, who were both sages and virtually lawmakers left very little, that was undefined. At a very remote period, law was treated under eighteen heads and one hundred and thirty-two sub-divisions and laid down rules of law both substantive and adjectival. Founders of their own jurisprudence, these philosophical jurists enunciated and expounded a system of law which does not suffer in comparison with Roman law which inspired the continental codes and much of English case law. By the Austinian principles of jurisprudence or theories of Bentham much of the traditional law of ancient India would be termed as 'morality' because that law was not 'a direct or circuitous command of a monarch or sovereign number to persons in a state of subjection to its author'. The *Smritis*; some of which deal exhaustively with various topics of law and are generally referred to as Institutes or Codes, were not codes in the strict sense in which a code is understood, ie, a single comprehensive legislative document on any particular topic or branch of law. The extant *Smritis* were compiled at different times and in different parts of the country but they all purported to record on traditional law.

Vyavahara : Positive Law.

Law by acceptance: *jus receptum.*

The *Smriti* was not autonomic law, which is the result of a true form of legislation or is promulgated by the State in its own person. It was not imposed by any superior authority *in invitos*.

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30 See also *maxim summa ratio est quae pro religione* for it.
31 See *Dharma*, Introduction to the book.
32 *Vyavahara* embraces forensic law and practice as well as rules for private acts and disputes.

There was no dogmatic insistence upon any fundamental notions of command of a sovereign and habit of obedience to a determinate person. What was accepted was the rule-dependent notion of what ought to be done as agreeable to good conscience and in conformity with the cherished article of belief that the fundamental rules of law had been derived from a divine author. A legal system is a system of rules within rules; and to say that a legal system exist entails not that there is general habit of obedience to determinate persons but that there is a general acceptance of a constituent rule, simple or complex, defining the manner in which the ordinary rules of the system are to be identified. One should think not of the sovereign and independent persons habitually obeyed but of a rule providing a sovereign or ultimate test in accordance with which the laws to be obeyed are identified. The acceptance of such fundamental constituent rules cannot be equated with habits of obedience of subjects to determinate persons, though it is of course evidenced by obedience to the law.[33] The general effective motive, according to these *Smritikars*, was observance of *Dharma* and the sanctions recognised by the people themselves. Enforcement of law (*Danda*) in the nature of things proceeded from the sovereign but one view of the genesis of legal institutes was that the king and the law were created by the people. Medhatithi and Vijnaneshvara as also the *Mahabharata* and the *Arthashastra* of Kautilya maintain the view that law as enjoined in the *Vedas* and the *Smritis* was of popular origin. It was law by acceptance—*jus receptum*—and constituted in part of recollections of precepts claimed as of divine origin and in part of conventional and customary law. The law rested on the quadruple source already mentioned and the sanction behind that law was not the will of any supreme temporal power but that which was inherent in the law itself and the nature of and sanctity attached to its sources.

Smritikars.

The *Rishis* who compiled the *Smritis* did not exercise temporal power nor did they owe their authority to any sovereign power. The authority or imperative character of their legal injunctions was partly derived from the reverence in which they were held and the accepted principle that what they laid down was agreeable to good conscience. What the *Smritikars* said was regarded as the principle direct evidence of *Dharma*. The *Smritikars* did not arrogate to themselves the position of lawmakers but only claimed to be exponents of the divine precepts of law and compilers of traditions handed down to them and clung to that position even when introducing changes and reforms. Changes in the law were primarily effected by the process of recognition of particular usages (unless they were repugnant to law) as of binding efficacy. Brihaspati ruled that 'immemorial usage legalises

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33 See *Professor Hart's Introduction to Austin's Province of Jurisprudence Determined*, pp xi–xiii. Prof. Hart also refers to Bryce, Kelsen and Salmond, *General Criticism of Austin's Doctrine of Sovereignty*.

any practice' and that:

> '"a decision must not be made solely by having recourse to the letter of written codes; since if no decision were made according to the reason of the law, or according to immemorial usage, there might be a failure of justice".[34]

Acting on these principles the *Rishis* abrogated practices which had come to be condemned by the people and ordained and prescribed rules based on practices and customs which had come to be recognised and followed by the people.

Smritikars were great jurists.

The *Smriti* texts evince profound acute thinking of the sages and jurisconsults responsible for them. A remarkable instance of this is furnished by their treatment of 'ownership' and its comprehensive signification. Salmond in defining ownership states that 'ownership' in its wide sense 'extends to all classes of rights, whether proprietary or personal, *in rem* or *in personam, Re propria* or *Re aliena*...' There are a number of texts in the *Smritis* on the subject of ownership which show that the jurisprudential concepts reflected through them remarkably accord with the view of the most modern writers on jurisprudence. The basis of what we know as Holland's theory of 'ownership' as 'plenary control over an object' and the necessary qualification to the same that the right of ownership must be enjoyed without interfering with the rights of others has been logically considered by the *Smritikars* and those who followed them[35] with due regard to the refinements implicit in this theory. Another remarkable instance was the recognition of 'prescriptions'. Although Roman law accepted extinctive and acquisitive prescriptions as sanctioned by jurisprudence, modern western lawyers, as pointed out by Sir Henry Maine, viewed them 'first with repugnance, afterwards with reluctant approval'. Law, it was said by these *Smritikars*, should help those who were vigilant in asserting, their rights and not those who slumbered over them. In their treatment of the law of prescription, these lawmakers evinced practical insight and legal acumen of a high order. Yajnavalkya laid down a period of twenty years for recovery by the lawful owner of land and ten years for the recovery of a chattel enjoyed by stranger,[36] and Brihaspati ruled that in case of continuous and uninterrupted possession of land for the prescriptive period there would even as against the original owner be created possessory title in favour of the person in actual possession.[37] Thus lapse of time was recognised both as destructive and creative of title. A further instance is equally remarkable. 'A fact', it was said in an apophthegm, 'cannot be

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34 *Brihaspati*, II, 26, 28 (*SBE*, Volume XXXIII).

35 There is an instructive dissertation by Vijnaneshvara on the juridical concept of ownership in Chapter II of the *Mitakshara*.

36 Grounds of legal disability were recognised. Thus, for instance, there was exemption from operation of limitation in case of minors, property of the king and deposits involving the element of trust.

37 *Brihaspati*, IX, 6, 7 (*SBE* Volume XXXIII).

altered by a hundred text'.[38] An act done and finally competed, though it may be in contravention of hundred directory texts (as distinguished from any mandatory text), will stand and the act will be deemed to be legal and binding. This maxim of Hindu law has been recognised and applied by the courts in cases of certain questions relating to the validity of marriage and adoption. The doctrine of Roman law corresponding to this maxim was *factum valet quod fieri non debuit*. Also notable was the logical acumen of the *Smritikars* and those who followed them to harmonise rules not easily reconcilable. The fallacy of rigid literal construction was not overlooked. Synthesis was as far as possible achieved by in effect rejecting that meaning which was apt to introduce uncertainty, confusion or friction.[39] In their desire to adapt the more ancient law to progressive conditions, they sometimes resorted to the favoured contrivance of the jurist by evolving a number of beneficent and elegant fictions. To mention only one, they announced the identity of the husband and wife and on that assumption rested the rule that in case of a person who died sonless his widow could succeed in preference to all other heirs recognised by law.[40] A maxim that found favour was that reason and justice are more to be regarded than mere texts. Some of the ancient rules of law propounded by these lawmakers surprise us by their strikingly modern character and remarkable insight into jurisprudential concepts, for insight does not depend on modernity.

Smritis sometimes divided into.

The *Smritis* or *Dharmashastras* are divisible into two classes. The first of these are the *Sutras*. Complete *Sutra* works contain aphorisms on sacrifices (*Shrauta*); aphorisms on ceremonies requiring domestic fire (*Grihya*) and aphorisms on law and custom treating of temporal duties of men in their various relations (*Samayacharika*). The last one of these three kinds of *Sutras* are referred to as *Dharma-sutras*.[41] Some of them were written in prose and some both in prose and verse.[42] The extant *Dharmasutras* though part of the *Smritis* of *Dharmashastras*, being more ancient, are sometimes differentiated from the metrical versions more specifically referred to as the *Smritis*. The principal extant

Dharmasutras and *Metrical Smritis*.

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38 There has been some conflict of opinion among Indian jurists on the question of the correct meaning of the maxim as stated by Jimutavahana: *Vachanashatenapi vastunonyathakara-nashaktch;* Chapter XXII, § 434.

39 Roman law.

40 *Yo Bharta sa Smritangana—Manusmriti*, IX, 45. *Jeevatyardhashareererertham Katham anyah samapnuyat... Asutasya prameetasya patnee: tadbhagahareem—Brihaspati* cited in *Smritichandrika*, Mysore Series No 48, p 678. The provisions of The Hindu Women's Rights to Property Act, 1937 (now repealed by The Hindu Succession Act, 1956; Act 30 of 1956) adapted this *fictio juris*.

41 The expression means 'strings or threads of rules of *dharma*'.

42 The objective of the *Sutras* or aphorisms was to give, in a compressed style of composition, principles and rules with the utmost brevity. The aphorismic style helped to avoid overburdening the memory. A trite saying was 'and author rejoiceth in the economising of half a vowel as much as in the birth of a son'.

Dharmasutras are those of Gautama, Baudhayana, Apastamba, Harita, Vasishtha and Vishnu. The *Smritis* more specifically, the Institutes of Manu, of Yajnavalkya, Narada and the *Smritis* of Parashara, Brishaspati, Katyayana and others belong to the second category of *Dharmashastras* and are later in age than the *Dharmasutras*. The *Dharmasutras* are sometimes divided into *Purva* and *Apara Sutras*, the former being the more ancient of them, but no list intended to be exhaustive. The *Sutras* generally bear the names of their authors and in some cases the names of the *Shakha* or School to which the authors belonged. It will suffice to refer only to some of them in the present context. The Gautama *Dharmasutra* belonged to the *Samavedins*. The Vasistha *Dharmasutra* belonged to the Vasishtha group of *Rigvedins* and the *Apastamba* and the *Baudhayana* to the *Taittiriyas*. The rituals of the groups differed in details. The *Dharmasutras*, however, dealt mainly with duties of men in their various relations and in course of time began to be accepted as of authority by members of all the groups.

Dharmasutra-The Sutra Period.

Dharmasutra-The *Dharmasutra* of Gautama, Baudhayana, Apastamba, Harita and Vasishtha are now considered and accepted to be the most ancient of the extant recorded aphorisms on law and custom treating the duties of men in their various relations.

As has been observed:

> Though the texts of the *Dharmasutras* have not always been preserved with perfect purity, they have evidently retained their original character. They do not pretend to be anything more than the compositions of ordinary mortals, based on the teachings of the Vedas, on the decisions of those who are acquainted with the law, and on the customs of virtuous Aryans... It is further still possible to recognise, even on a superficial examination for what purpose the *Dharmasutras* were originally composed. Nobody can doubt for a moment that they are manuals written by the teacher of the *Vedic* Schools for the guidance of their pupils, that at first they were held to be authoritative in restricted circles, and that they were later only acknowledged as sources of the sacred law.[43]

The *Dharmasutras* were fascicular rules, which came to be accepted as records of the one traditional law. They were not bodies of law struggling with each other for recognition. Composed in different parts of the country and at different times, they did not present any anomaly but tended to slide into each other. In common with most of the *Dharmashastras*, they mingled religious and moral precepts with secular law. Some of them are remarkable for the manner and vigour of

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43 Dr Buhler: *Introduction to 'The Laws of Manu'*, Sacred Books of the East Series, Volume 25, p XI. The *Smritis* of Manu and some others were largely based on law, which had partly been systematised by the *Sutrakars*. The *Dharmasutras* supplied the ground plan for those works.

their expression and the multifariousness of the subjects of living interest covered by them. Some of these teachers give the impression that they were free willed, creative, ideal-harbouring human beings who did not feel bound by everlasting orthodoxies. In their texts there are no urgings to docile and sedulous conformity to every authoritarian mandate of the ritualists. If anything, they suggest that confining and endless conformity is bad for the human spirit. The authors of these *Dharmasutras* took the law from earlier *Gathas* and *Sutras* and customs which had grown up bit by bit and reduced them to some sort of order and symmetry. Some of these *Sutrakars* have evolved idioms of expression and contributed a significant quota to the language of law.

Apastamba.

The *Apastambasutra* is probably the best preserved of these *Sutras*. In a distinguished manner not free from archaic phraseology, Apastamba treats certain aspects of the law of marriage and of inheritance and criminal law. A notable feature of this *Sutra* is the clarity and forcefulness of its language. Untampered with by later redactors, it is one of the most quoted of the *Sutras* and accepted as a high authority. Apastamba hailed from the South and it is believed that in his work were embodied the customs of his part of the country. Haradatta has written a commentary on this work. It is entitled *Ujjvala*. Apastamba emphasises the traditional view that the *Vedas* were the source (*pramana*) and nucleus of all knowledge. He takes care, however, at the end of his work, to impress his pupils with statement; 'Some declare that the remaining duties (which have not been taught here) must be learnt from women and men of all castes'.[44] He also states; 'The knowledge which...women possess is the completion of all study'.[45] Haradatta explains this as in part referable to the science of useful arts and other branches of *Arthashastra* which latter expression he uses as embracing all general knowledge. The classical Sanskrit writers including Kalidasa endorse this pithy maxim in some choice phrase. The expressions 'knowledge' and 'completion of all study' were presumably used by Apastamba bearing in mind the rule that wide and comprehensive meaning must be attributed to word if they are fairly susceptible of it.

Gautama.

The *Gautamadharmasutra* is probably the oldest of the extant works on law and as already pointed out belonged to the *Samavedins*. The injunction that it was the duty of the king to preserve intact the time-honoured institutions of each country and make authoritative the customs of the inhabitants of different parts of the country just as they are stated to be, favoured by Manu, Brihaspati, Devala[46] and other writers of the metrical *Smritis*, does

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44 II, 11, 29, 15.
45 II, 11, 29, 11.
46 *Yasmin deshe pure grame traividye nagarepiya; yo yatra vihito dharmastam dharman na vichalayet.*

not appear to have been quite established at the time of Gautama.[47] It would seem, however, that by the time of Baudhayana the rule was firmly established.[48] *Gautamadharmasutra* is in prose and treats extensively of matters legal and religious. These include questions of inheritance, partitions and *Stridhana*. Gautama attaches adequate importance to tradition and practices and usages of cultivators, traders, herdsmen, moneylenders and artisans.[49] Haradatta has written a commentary also on the work of Gautama.

Baudhayana. *Baudhayanasutra* is not available in its integrated form. What we have is a dismembered work, which according to the researches of Dr Burnell consists of four *Prashnas* of which the last would seem from intrinsic evidence to be an interpolation. There is evidence both internal and external to suggest that *Budhayanasutra* is older than *Apastambasutra*. Dr Buhler has examined various arguments which go to establish the high antiquity of this work.[50] Baudhayana is rather elaborate in his treatment and discursive. He himself says: 'This teacher is not particularly anxious to make his book short'. Baudhayana treats of a variety of subjects including inheritance, sonship, adoption and marriage. He mentions a number of usages and practices of the people and refers to certain customs prevalent only in the South, one of them being marriage with the daughter of a maternal uncle. He also mentions some customs which were peculiar to the people living in the North, two of them being trading in arms and going to sea.[51] He also speaks of the levy of sea-customs *ad valorem*[52] and of imposition of excise duty on traders by the king.[53]

Harita. Harita is another *sutrakar* whose work deserves special notice. One of the most quoted of the early exponents of law, he is mentioned as an authority by Apastamba and some other compilers of *Dharmasutras* and it is possible that his work is one of the oldest *Dharmasutras* so far known to be in existence. His treatment follows the same pattern that is adopted by the early *Sutrakars*. Harita is freely quoted also by the commentators. A verse ascribed to Harita is reminiscent of the stage of progress that Hindu law had made even during the first period of the era of the *Dharmashastras*: when the defendant avers that the matter in controversy was the subject of a former litigation between him and the plaintiff when the latter was defeated, the plea is a plea of former judgment—*pragnyaya*. This is similar to the doctrine of *res judicata* and the *exceptio res judicatae* of Roman law.

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47 Gautama, however, does say that the laws of countries, castes and families should be recognised in administering justice—XI, 20.
48 See *Baudhayana*, I, 1, 2, 1–8.
49 *Gautama*, XI, 21.
50 *SBE*, Volume XIV, p xxxvii.
51 I, 1, 11, 1–4.
52 I, 10, 18, 14.
53 I, 10, 18, 15.

Vasishtha.

Of the *Dharmasutra* of Vasishtha, not much is extant. He deals *inter alia* with source and jurisdiction of law and rules of inheritance, marriage, adoption and sonship. Vasishtha stresses the importance of usage and describes it as a supplement to law. A number of manuscripts of this *Sutra* have been translated and published and opinion is divided on the question of the authenticity of certain chapters. Vasishtha gives an interesting description of *Aryavarta* (the country of Aryas).

He adds that, according to many writers, its northern and southern boundaries were respectively the Himalayas and the Vindhya range[54] and goes on to state that customs which are approved in any country must be everywhere acknowledged as authoritative.[55]

Vishnu.

Vishnu is another *sutrakar* whose collection of aphorisms is entitled to consideration among the ancient works of this class which have come down to our time. Vishnu is one of the *Smritikars* mentioned in the enumeration of Yajnavalkya[56] but an examination of the extant work clearly show that its author has copiously borrowed from Manusmriti and other standard works and must have adopted as the basis of his work an ancient collection of aphorisms intituled *Vishnusutra*. The bulk of the extant work consists of rules in prose composed in the laconic style of the early *Sutrakars* but most of the chapters conclude with metrical verse. It deals with rules of criminal and civil law, inheritance, marriage, debt, interest, treasure trove and various other subjects. Nandapandita, himself and erudite writer on law, has written a commentary of *Vishnusutra* known as the *Vaijayanti*.[57]

Some other authors of *Dharmasutras*.

Of other ancient authors of *Dharmasutras* very little is known although the aphorisms of some of them, mostly remnants, are to be found mentioned in the works of later compilers of the *Dharmashastras*. Of those, mention must be made of the brothers Shankha and Likhita the co-authors of a *Dharmasutra* bearing their names. In and oft-quoted verse from *Parasharasmriti*, the *Dharmasutra* of Shankha-Likhita is given considerable prominence. The *Dharmasutra* of Ushanas is mentioned by Yajnavalkya in his enumeration. The author appears to have ascribed his work to Ushanas[58] who is probably *Shukra* the mythological preceptor and the regent of the planet Venus. An oft-quoted text of Ushanas it that the son is under no pious obligation to pay a fine or the balance of a fine or a tax (or toll) due by the father; nor is he bound to pay a debt due by the father which is not proper.[59]

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54 I, 8, 9, 12, 13.
55 I, 10, 11—Provided they are not contrary to the policy of law.
56 See *Smritikars*, Introduction to the book.
57 A translation of *Vishnusutra* by Dr Jolly was published in the *SBE* Series, (Volume VII).
58 Ushanas in mentioned as an ancient *seer* in the Bhagavad Gita Discourse X, 37.
59 *Na vyavaharika*.

Importance of the *Dharmasutras*.

The great importance of those works today is not so much in their texts as in the concepts of jurisprudence reflected through their medium and the historical value of their contents and the reference that is traceable in them to previously unrecorded custom, and crystallisation in the form of precepts of usages and practices and the transformation of these into constituent law. Gautama in enumerating the sources of the sacred law speaks of the *Vedas* and the tradition and practices of those who know (the *Vedas*). The chapter on duties of a king also states that his administration of justice shall be regulated by the *Veda*, the Institutes of the sacred law and the laws of countries, castes and families provided they are not repugnant to the sacred records.[60] There are similar express texts recognising custom as a source of law (*Dharmamoolam*) and also references both direct and implied to various customs in the *Dharmasutras* mentioned above showing that the law was traditional and that custom was a constituent part of it.[61] It may be of interest to underline some of the liberal rules relating to the status and rights of women which found favour with these early exponents of law. Remarriage of widows and divorce are recognised in some of the old texts.[62] In *Vishnusutra*, it is stated that on partition between brothers after the father's death, not only are the mothers entitled to share equally with their sons but unmarried sisters also are entitled to their aliquot shares.[63] These teachers of the *Vedic* Schools brought a virile mind to the deposits of the legal thought and traditions of the past. Acclaimed propounders of the early *Smriti* law, these *Sutrakars* primarily sought to express the *communis sententia* of the Indo-Aryans and were unanimous in their appeal to customary law. This adherence to the doctrine of accepted usage and the enjoined duty of the interpreter of law to see that customs, practices and family usages prevailed and were preserved is one of the outstanding features of Hindu jurisprudence.

Chronology of *Dharmasutras*.

Of the *Dharmasutras*, we have some reliable history though the task of the historian in fixing the chronology of these works has been indeed hard. However, the problem of determining the dates of the leading *Dharmasutras* and *Smritis* was so fascinating and opened up such a vast field for reconstruction that during the last hundred years some jurists and scholars both European and Indian have critically and with meticulous care examined the available data and relevant criteria and assigned the approximate dates of the

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60 I, 1, 2; XI, 19–21, *SBE*, Volume II.

61 According to Roman jurisprudence 'customary law' obtains as positive law by virtue of the *consensus utentium*. Justinian states: *nam quid interest, populus suffragio vluntatem suam declaret, an rebus ipsis et factis? Digest*, 1, 3, 32.

62 Vasistha, XVII, 72–74 *SBE*, Volume XIV. This was in consonance with *Rig veda*, 10M 18, 7.

63 *Matarah putrabhaganusarena bhagaharinyah anudhhashacha duhitarah*—Vishnu, 18, 35.

compilation of these works. There have been many handicaps to the task of fixation of the dates of the various *Dharmashastras*. A number of early *Dharmasutras* are not available. Nor are available the complete texts of all the extant *Smritis*. Then again some texts attributed to some of the ancient exponents of law are to be gathered only from later works which quote them as authority. Of the available *Dharmashastras* some quote with approval previous works but do not throw any light on the question of their age. In case of some of these *Dharmashastras*, it is not possible to rule out the existence of interpolations and in case of one or two of them there are manifest indications of subsequent remodelling of the texts. In these circumstances the conclusions reached must often of necessity rest with the fixation of the approximate century during which the particular *Dharmashastras* must have been compiled. There was a sharp controversy amongst some earlier Western and Indian scholars on the question of the chronology of the *Dharmashastras*. There is some difference of opinion amongst the Indian jurists and scholars themselves as to the time when some of the *Dharmashastras* where first reduced to writing in the form in which they are extant. According to some of the earlier Western writers, the *Smritis* were reduced to writing some centuries later than the dates assigned to them by Indian jurists and scholars. It has been the opinion of the Indian critics that on this point some Western scholars often indulged in *a priori* reasoning and based their conclusion on unsound analogy. An analysis of the reasons in support of their conclusions given by some eminent jurists and scholars both European and Indian would suggest that the *Dharmasutras* of Gautama, Budhayana, Apastamba and Vasishtha must have been recorded between about 800 BC and 300 BC. Dr Jolly has tried to prove that the *Apastambasutra* is the oldest of these. Mahamahopadhyaya Kane puts the time of *Gautamadharmasutra* before the spread of Buddhism and his opinion is that this *Sutra* cannot be placed later than the period between 600–400 BC.[64] The age of Chandragupta Maurya which is reliable fixed as 321 BC to 297 BC is the sheet anchor of Indian chronology. Almost equally useful is the date of Panini who lived 'probably soon after 500 BC'.[65] Some Sanskritists on the other hand have made claims of greater antiquity for some of the extant *Dharmashastras*. They also rely on certain data. However, it seems unnecessary to join in the desire to go as far back as possible for the purpose of enhancing the importance of these ancient authorities on law.

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64 Part I, p 16.

65 Macdonell, *India's Past*, p 136. Panini is the author of a work on grammar described as 'monument of thoroughness and algebraic brevity'. Panini gives some data of considerable importance to the historian (Dr RK Mookerji, *Hindu Civilization*, Chapter VI).

Yajnavalkya's enumeration of *Smritis*.

In a verse of Yajnavalkya are enumerated twenty of the *Dharmashastras* all bearing the names of the *Rishis* to whom their authorship was ascribed. Manu, Arti, Vishnu, Harita, Yajnavalkya, Ushanas, Angiras, Yama, Apastamba, Samvarta, Katyayana, Brishaspati, Parashara, Vyasa, Sankha, Likhita, Daksha, Gautama, Shatatapa, and Vasishtha are mentioned as founders of *Dharmashastras*.[66] The verse obviously was penned by a later redactor and the list is illustrative and not exhaustive. Narada, Budhayana and some others not mentioned here are among the recognised compilers of law.[67]

Smritis supplementary to each other.

Of the numerous *Smritis* the first and foremost in rank of authority is *Manusmriti* or the Institutes of Manu. There is a striking resemblance and agreement among the *Smritis* on many questions and they purport to embody one traditional law. All the *Smritis* in course of time came to be regarded as of universal application. No greater authority was attached to one than to another *Smriti*, except in case of Manusmriti which was received as of the highest authority. It was not as if any one *Smriti* was taken as in substitution for another on any particular aspect or branch of law or as of greater authority in any part of the country but they were all treated as supplementary to each other.

Manusmriti.

Manusmriti or Institutes of Manu is by common tradition entitled to place of precedence among all the *Smritis*. The other *Smritikars* themselves subscribe to this view. Opinion, however, is divided on the question of the identity of Manu. It seems impossible to offer any strong data one way or the other on the somewhat fascinating riddle as to the identity of the original lawgiver or to point out the specific rules of law promulgated by him and preserved as part of the extant Code. There is striking resemblance and agreement among the *Smritis* and they purport to embody one traditional law often stated to be the pronouncements of Manu who was accepted as the first expositor of law and often reverently referred to by the *Smritikars* in the *pluralis majestatits*. The ancient law existed before writing was invented and human memory had to be its sole repository. It was not static but a growing system and was handed down for centuries from preceptor to disciple in succession. In course of time had come the *Gathas* and *Sutras* of the Brahmana period, and after that came the *Dharmasutras*. All these were supplementing, altering and gradually moulding the ancient traditional

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66 *Dharmashastraprayojakah* I, 4, 5. In his *Nirnayasindhu*, Kamalakara refers to over 100 *Smritis*. Many of those mentioned by him have not been found.

67 The *Padmapurana* lists 36 compilers of law. The name of Arti mentioned in *Yajnavalkyasmriti* is not mentioned. To the other 19, are added Marichi, Pulastya. Prachetas, Bhrigu, Narada, Kashyapa, Vishvamitra, Devala, Rishyashringa, Gargya, Baudhayana, Paithinashi, Javali, Samantu, Parashara, Lokakshi and Kuthumi.

law into system. This evolution was going on for many centuries and so was going on the process of lawmaking with a body of customs taking and receiving recognition from time to time and itself forming a constituent part of the traditional law. The rules of law attributed to Manu, the first patriarch, were bound to come up continuously for consideration and application and the exponent or interpreter of law had to take account of the law at the time extant and also attach adequate importance to growing usages and customs. The accretions were naturally accepted as part of the same law and having the same obligatory force as the original rules. The fixation of these rules was obtained when the Code itself was compiled and bore the name of Manu, the original exponent of law. The Code is not in the language of *Vedic* time and it is obvious that it was reduced to writing at a later period. The date of this compilation in its extant form can now fairly reliably be fixed as about 200 BC but there is little historical data about its actual author. The Code contains interesting parallels with other works and the author, whatever his real identity was, appears to have compiled an exhaustive code binding on all and identified it with the most familiar and venerated name of Manu, the primeval legislator. The *Dharmashastras* right from the *Rig-Vedic* age copiously refers to the opinions of Manu and of Manu *Svayambhuva*. Then again there are references made to *Prachetasa* Manu and *Virddha* Manu. References are also made to *Manudharmasutra*. Evidence about Manu traditionally accepted as the first exponent of law cannot altogether be said to be scanty, nor is there any conclusive data to establish his identity. There is not much reason however, for the student of Hindu law to make himself uneasy over the paucity or uncertainty of evidence regarding the identity of the real author of the extant *Manusmriti* or of the original Manu whose name it bears. What is of importance and consequence is the paramount authority of Manu. It has been repeatedly asserted and affirmed that the authority of the precepts contained in the *Manusmriti* was beyond dispute.

Manu, the first Patriarch.

Identity of the actual compiler of the code is not known.

The extant Code of Manu compiled in about 200 BC was obviously an answer to a long-felt desideratum because the legal literature of the *Dharmasutra* period had not produced any work which could meet the requirements of a compendium of law in all its branches. The unique position acquired by it as the leading *Smriti* and effectually of the most authoritative reservoir of law was due both to its traditional history and the systematic and cogent collection of rules of existing law that it gave to the people with clarity and in language simple and easy of comprehension. Analogy, though imperfect, of the *Codex Theodosianus*, a compilation promulgated in 429 AD and the *Codex Justinianus* compiled in 528 AD may serve to give and idea of the purpose

Corpus Juris of ancient India.

achieved by the institutes of Manu.[68] Virtually amounting to a recasting in a convenient and easily accessible form of the whole of the traditional law it appears to have in practice replaced on matters covered by it the use of the rules of law stated in earlier *Gathas* and *Sutras* and the chapters on *Vyavahara* in the *Dharmasutras* most of which it has practically embodied. The Code is divided into twelve chapters. In the eighth chapter are stated rule on eighteen subject of law—intituled titles of law—which include both civil and criminal law.[69] In the later treatises other *Smritikars* have mostly followed this division and the nomenclature adopted in the Code except that the ninth division of Manu was dropped and the title of *Prakirnaka* (miscellaneous) was supplemented.[70] The author of the extant *Smriti* may not have been the originator of the famous division but it appears to have been a traditional classification accepted and popularised by him. The rules of law laid down in *Manusmriti* and its most characteristic doctrines have today their practical importance in this that the Code is a landmark in the history of Hindu law and a reservoir to which reference may at time become necessary for the proper appreciation of any fundamental concept or any question involving first principles. Law of inheritance, property, contracts, partnership, master and servant are some of the branches of law comprising the Code. The Code records many genuine observances of the ancient Hindu and gives a vivid idea of the customs of the society then extant. The ordinance of Manu is based on ancient usages. Predominance was to be given to approve usage in all matter: 'Let every man, therefore... who has a due reverence for the supreme spirit which dwells in him, diligently and constantly observe immemorial custom. Thus have the holy sages, well knowing that law is grounded on immemorial custom, embraced, as the root of all piety goods usages long established. A King... must inquire into the law of castes (*jati*), of districts (*ganapada*), of guilds (*shreni*), and of families (*kula*), and settle the peculiar law of each'.[71] In his survey of the duties of the king, Manu stresses the importance of *danda*, which connotes the sanction behind the power of the king restrain transgressions of

Eighteen titles of law.

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68 An examination of the departments of law dealt with in *Manusmriti* will show that it was a complete code embracing all branches of law and was suitable to conditions then prevalent and the exigencies of the time. The colonial expansion of India at one time embraced almost the whole of South-east Asia. It may be of some interest to notice that the name of Manu was authoritatively associated with the laws of many countries in that vast region. On the facade of the legislature building in Manila, the capital of the Philippines, are four figures representing the culture of that country. One of the figures is of Manu.

69 *Manusmriti*, VIII 4–7. The 18 titles are: I. Recovery of Debts; II. Deposit and pledge; III. Sale without ownership; IV. Concerns amongst partners; V Resumption of gifts; VI. Non-payment of wages or hire; VII. Non-performance of agreements; VIII. Rescission of sale and purchase; IX. Disputes between master and servant; X. Disputes regarding boundaries; XI. Assault; XII. Defamation; XIII. Theft; XIV Robbery and violence; XV. Adultery; XVI. Duties of man and wife; XVII. Partition (of inheritance); and XVIII. Gambling and betting.

70 For instance, see *Naradasmriti*, XVIII.

71 *Manusmriti*, VIII, 41, 46.

law and to inflict punishment on offenders. The *danda* 'alone governs all protected beings, alone protects them, watches over them while they sleep; the wise declare it (to be identical with) the law'.[72] Other leading *Smritikars* echo this punitive element of the theory of kingship. Of the numerous English translations of the Code, the one that has often been referred to is that by Dr Buhler which was published in the *Sacred Book of the East Series* in 1886.[73] A number of commentaries were written on Manu's Code during the post-*Smriti* period by Medhatithi, Govindaraja, Kulluka and others. Kulluka's text has been referred to for centuries in India and Dr Buhler's translation was made from a recension of Manu given by Kulluka. Mahamahopadhyaya Sir Ganganath Jha has published volumes on the *Manusmriti* with Medhatithi's commentary.

Commentaries on Manusmriti.

Of the commentaries on *Manusmriti*, the most notable is *Manvarthamuktavali* of Kulluka.

Kulluka.

In the preface to his translation of *Manusmriti*, William Jones observed:

> It may perhaps be said very truly that it is the shortest yet the most luminous, the least of ostentatious yet the most learned, deepest yet the most agreeable, commentary ever composed on any author, ancient or modern.

Obviously, this was superlative praise. Kulluka freely quotes Medhatithi and Govindaraja and attack some of their explanations and comments in a trenchant manner. He directed the shafts of his sarcasm against them and his remarks when he derides them are spiced with malice and made in poor taste. He refers to some of the observations of Govindaraja with sarcastic mockery and in a manner reminiscent of some of the neatest and most pointed of the eighteenth century English satirists. There was no limitation to Kulluka's egotism as might be seen from his own assessment of his exposition and ability as a commentator,[74] but it cannot be said that he was a legist of the first rank. His forte was an ability to reduce difficult rules to the simplest language and logic. There is no obscurity about his style. Master of his subject, he is not altogether free from sophistry in his reasoning. There can, however, be no doubt that the merits of Kulluka's work and of his original technique as a critic are outstanding. His elucidations and amplifications of some laconic expressions and curious terms used by Manu and the occasional obscurity of Manu's texts have for centuries been of great assistance and his *Manavartha-muktavali* is a very valuable production.

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72 VII, 18.

73 Mention here may be made of the translation of *Manusmriti* by William Jones, which came out in 1794. In his preface, he observed: The style of it (*Manusmriti*) has a certain austere majesty,that sounds like the language of legislation and exhorts a respectful awe; the sentiments of independence on all beings but God and the harsh admonitions even to kings are truly noble…

74 *Vyakhyataro na jagruparepyanyato durlabham vah.*

Medhatithi.

Of further commentaries on *Manusmriti*, which are many, reference may only be made to those of Medhatithi and Govindaraja. Medhatithi although he shows great veneration for Manu states that the Prajapati Manu of the *Smriti* was: a particular individual perfect in the study of many branches of the Veda, in the knowledge of its meaning and in the performance of its percepts, and known through the sacred tradition which has been handed down in regular succession.[75] Medhatithi sometimes resorts to general propositions, which expose him to the attack that he is begging the question. In matters of law, general statement, unless they weld a formidable mass of particulars, can rarely be convincing. They merely convey 'nothing but a benevolent yearning'. Kulluka does not fail to criticise Medhatithi for this tendency of his. As a rule Medhatithi's interpretations and comments are instructive and dependable although sometimes he indulges in casuistic subtlety as for instance when he explains away the oft-quoted verse of Manu permitting remarriage of a widow. This not to disparage the merit of his work which is copiously informative and a landmark in the legal history of Hindu law, and it seems only right to add that most of his broad propositions are the result of reflective generalisations. Medhatithi shows perfect mastery of the *Mimansa* rules and admirable legal acumen. In his *Manubhashya* he cities freely from earlier *Dharmasutras*. His citations are apposite and selected only for the purpose of elucidation and at times for extracting principles.

Govindaraja.

The *Manutika* of Govindraja despite some lapses gives a faithful explanation of the texts of the *Smriti* and is a reliable commentary. There is not much subtlety. However, there is depth. Govindaraja sometimes illustrates the obvious and is rather elaborate in treatment. He is patiently analytic and pedestrian but sound in his exposition.

Yajnavalkya Smriti.

Yajnavalkyasmriti or the Institutes of *Yajnavalkya*, it would seem from relative criteria, must have been compiled in about the first century after Christ. According to one tradition, Rishi Yajnavalkya was the grandson of the redoubtable royal sage Vishvamitra. In the introduction to the Code it is mentioned that it was in an assembly of sages that this *Dharmashastra* was pronounced by Yajnavalkya. It is also stated in this *Smriti* that the compiler was the same person who was the author of the *Brihadaranyaka Upanishad*.[76] The more acceptable view seems to be that the Code was not authored by the sage of that *Upanishad* but was the work of a follower of Yajnavalkya who hid his identity behind the name of the venerated *rishi*. Support is to be derived for his view from a statement in the *Mitakshara* of Vijnaneshvara, the celebrated expository treatise on this *Smriti*.

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75 I, 58.
76 *Yajnavalkyasmriti*, III.110.

The Code contains many parallels with other *Smritis* and draws upon and quotes from several of them. Yajnavalkya states that the ordained foundations of *Dharma* are: 'The *Shruti*, the *Smriti*, the approved usage, what is agreeable to one's self (good conscience) and desire sprung from due deliberation'.[77] The last part of this text would seem to add one more source of law to those enumerated by Manu.[78] The oft-quoted words of Manu:

'*Yet Karma Kurvatosya syat Paritoshantarat-manah...*',[79] which emphasise satisfaction of the inner self as one of the indices of *Dharma* and the expression 'desire sprung from due deliberation' have no bearing on positive law and must be read as having references to *Dharma* in its ethical sense. The 'self-satisfaction' mentioned in this context is not any one's self-satisfaction but of those good persons who were learned in the *Vedas*.[80] The words 'desire sprung from due deliberation' do not incorporate any doctrine of private judgment in law.

Yajnavalkaya is more liberal than Manu.

The Code of *Yajnavalkaya* is in the main work founded on *Manusmriti* but the treatment here is more logical and synthesised. On a number of matters and particularly on question of status of *Shudras*, of women's right of inheritance and to hold property, and of criminal penalty, *Yajnavalkya* although a follower of conventional conservatism is decidedly more liberal than Manu. The influence, though not direct, of Buddha 'the enlightened' and Buddhism on the *Vyavahara* part of *Dharma* of this *Smriti* and the *Smriti* of Narada cannot be minimised. Buddha's teachings and particularly his message of universal compassion naturally had effect on certain invidious and rigorous aspect of law and this is reflected on the *Smriti* of Yajnavalkya. Punishments prescribed in this Code are comparatively less severe in case of number of offences. There is greater recognition of rights of women and of the status of *Shudras*. Yajnavalkya deals with a number of subjects and deals exhaustively with the law of mortgages and hypothecation. He also deals with partnership and associations of persons interested in joint business ventures: A number of traders, carrying on trade or making profit, shall share profit and loss according to their respective share or according to the compact made between them. If any member of a company does an act, forbidden by the general body, or without their permission or negligently, and thereby causes a loss, he shall have to indemnify the others for the same.[81]

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77 I 7, Yajnavalkya enumerates in a well-known verse, 14 sources of knowledge and *dharma*: The four *Vedas*; their six *Angas* or subsidiary science; the *dharmashastras*, the *Mimansa* containing rules of exegesis; the *Nyaya* or dialectic philosophy; and *Puranas* or records of antiquity—I,3).

78 *Manusmriti*, II, 12.

79 *Manusmriti*, IV, 161.

80 *Medhatithi*, II, 6.

81 II, 262, 263, see also Voet: '*Societas est contractus jurisgentium, bonoe fidei consensu constans, semper re honesta, de lucri et damni communione*'.

Development of law of procedure.

Adequate importance has not been given in *Manusmriti* to the rules of procedure. There are quite a number of verses in *Yajnavalkyasmriti*, which shows that the law of procedure and evidence to be followed in civil disputes had made considerable progress by the time of Yajnavalkya. There are no arid technicalities, but it is clear that by that time some elements of strict procedure had been found necessary and desirable. *Yajnavalkya* endorses the rule of pleading, which insists upon all material facts on which party relies being set out in his statement of claim or defence.

Vyavaharapada.

'That which is not alleged does not in the eye of law exist even though as matter of fact it might so exist'.[82] Yajnavalkya does not confine justiceable matters to the eighteen titles popularised by the author of *Manusmriti*. *Vyavaharapada*—a case for judicial proceeding—arises if any right of a person is infringed or any wrong is done to him another in contravention of the *Smritis* or customary law.[83] There are some remarkable verses in *Yajnavalkyasmriti* which challenge any possible assertion of divine right of kings. He exhorts the king to be modest, evenminded and righteous, to give himself in service of his subject and to daily look after the administration of justice. The injunction is: 'whether a brother, a son, a preceptor... none can escape from the punishment of the king, if he deviates from the performance of his own duties'.[84]

Yajnavalkya on the whole is scientific and constructive. Although he is at time unduly elaborate there is in his work on most of the matters rigorous exclusion of the inessential. Most of his legal precepts though succinctly stated are full of juridical meaning and import.[85] Sometimes he introduces in his language an audacious trick of phrase. He has enriched the vocabulary of law with some expressions remarkable for their precision and significance.[86] It is true that the authority of *Yajnavalkyasmriti* was greatly enhanced by the edifice of *Mitakshara* raised upon it by Vijananeshwara and which commentary is today of pre-eminent importance in the greater part of India.[87] That does

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82 *Mitakshara*, II. 19.

83 I, 5 *Smrityachara vyapetena Margenadharshitah paraih: Avedyati chedragne vyavaharapadam hi tat.*

84 I, 358.

85 For instance the verses relating to partition and the texts about partition per stripes between the members of different branches of joint family. Division of property *rebus sic stantibus* is implicit in those rules. Also the rule about priority of the title in case of successive hypothecations or sales—II, 23, and the rule about ascertainment of shares of partners—II, 259.

86 In stating the familiar examples of Act of State and act of God resulting in frustration of contract he uses only one word namely, the compound expression '*Raja-Daivika*'. For 'sources of law' he used the significant expression '*gnapakahetun*'.

87 For other important commentaries on *Yajnavalkya*, see Introduction to the book. For *Mitakshara*, see Introduction to the book.

not, however, detract from the merits of the work which has always been accepted as one of the three principle Codes among the *Dharmashastras* and referred to as high authority by commentators of repute and in decision of Privy Council.

Naradasmriti.

Naradasmriti, also known as *Naradiyadharmashastra*, was compiled in about 200 AD. Narada purports to accord ancient writ when he professes merely to be compiler of the traditional law handed down from the time of Manu.[88] In the introduction to his Code, Narada states that it is an abridgment of the larger work of Manu said to have originally been in one hundred thousand verses. The Code of Narada has come down to us in its integrity. It begins with an introduction and the treatment of the subject is divided into two parts. The first deals with judicature and the second enumerates and discusses with remarkable clarity the eighteen titles of law contained in the *Manusmriti*. Clarity and fidelity to the texts of Manu are not, however, the only merits of the Code. Although there is a faithful similitude with certain texts of Manu, Narada differs from him on a number of interesting and important points. He is categorical and emphatic in his statement that custom is powerful and overrides text of the sacred law.[89] His work is systematised and he is exhaustive in his treatment. He does not show any servile adherence to the views of his illustrious predecessors; nor does he shrink from stepping in and declaring rules in conformity with the changes that had taken place in social, economic and political conditions. One great merit of this *Smriti* is that it states the law in a straightforward manner and logical sequence which is readily assimilated and in a style which is both clear and attractive. There is euphony in a number of verses of Narada but he never sacrifices precision to euphony. Narada is renowned for the advanced and progressive with the view expressed by him on a number of matters. A feature of his *Smriti* is that it deals solely with law (*Vyavahara*) and does not contain sections on *Achara* or *Prayashchitta*. Some of the topics of law dealt with by Narada are inheritance, ownership, property, gifts and partnership. He also treats *inter alia* of the age of majority,[90] shares of widow and unmarried sister on partition between sons, and recognises separation and remarriage by a woman in certain circumstances.[91] Narada gives some detailed rules relating to payment of interest. After stating the general rules relating to interest, he adds that there can be special rules recognised by usage. There are some rules founded on

Advanced and progressive views of Narada.

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88 The colophon in one manuscript in Nepalese character examined by Prof Jolly '*Iti Manavadharmashastre Naradaproktayam Samhitayam*'.

89 *Vyavabaro hi balavan dharmasten avabiyate*—IV, 40. Justinian's compilations are collectively referred to in modern legal literature as the *Corpus juris civils*. In the digest, which is a part of the same and sometimes called the *Pandects*, states: '*Quare rectissime illud receptum est, ut leges non solum suffragio legislatoris, sed etiam tactio consensu ominium per desuetudinem abrogatur*'.

90 *Narada* uses the expression '*Vyavaharajnah*' to denote one who is *suit juris*.

91 XII, 96–101.

principles, which are recognised as sound under the modern law on the subject of interest. In certain cases of loans where no interest is stipulated, interest can begin to run from the date of demand.[92] Narada condemns usury.[93]

Rules of pleadings.

An outstanding feature of this *Smriti* is that it lays down a series of rules relating to pleading, evidence of witnesses and procedure. These rules make interesting reading and reference may be made to some of them. Narada speaks of the plaint as of the essence of a law-suit and stresses the rule that it must disclose a proper cause of action.[94] In dealing with the defendant's reply he states: 'The defendant immediately after having become acquainted with the tenor of the plaint, shall submit in writing his answer, which must correspond to the tenor of the plaint'.[95] 'An answer is fourfold: a denial; a confession; a special plea; and that which is based on a plea of former judgment'.[96] Reverting to the pleading of the plaintiff he adds: 'Before the answer to the plaint has been tendered by the defendant, the plaintiff may amend his own statements as much as he desires'.[97] 'These are called the defects of plaint: if it relates to a different subject; if it is unmeaning; if the amount (relief) has not been properly stated; if it is wanting in propriety; if the writing is deficient or redundant...'.[98] 'He who forsakes his original claim and produces a new one, loses his suit, because he confounds two plaints with one another'.[99] As to burden of proof he rules: 'what the claimant has declared in the plaint that he must substantiate by adducing evidence at the trial'.[100] 'Where the defendant has answered the plaint by means of a special plea, it becomes incumbent on him to prove his assertion, and he is placed in the position of a claimant'.[101]

Referring to the decree of the court, Narada says: 'The victorious party shall receive a document recording his success and couched in appropriate language'.[102]

King-made laws.

A striking feature of *Naradasmriti* is that it is the first of the *Dharmashastras* to accept and record the principle that king-made laws could override any rule of law laid down in the *Smritis*. The most glorious chapter in the history of ancient India has commenced with the reign of the Maurya dynasty (founded by Chandragupta in 321 BC). Ashoka, *devanampriya* as he is described in his edicts, was another Mauryan Emperor who ruled an

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92 I, 105, 108, 109.
93 I, 110, 111.
94 Introduction I, 6: *Sarastu vyavaharanam pratijna samudahruta.*
95 Introduction II, 2.
96 Introduction II, 4.
97 Introduction II, 7.
98 Introduction II, 8.
99 Introduction II, 24.
100 Introduction II, 37.
101 Introduction II, 31.
102 Introduction II, 43.

empire, the boundaries of which extended from the Himalayas to the Vindhyas and the eastern ocean to the western ocean.[103] Other emperors and powerful kings succeeded the Mauryan and other emperors and kings, while theoretically subscribing to the tradition that law (*Dharma*) was mightier than the king, promulgated many law and edicts and from the nature of things the king-made laws were bound to be enforced.[104] The monarchs who flourished in that age might well have said like their Roman contemporaries *'Regia voluntas suprema lex'* but as a rule they took care not to say it aloud. Narada concedes the high authority and sanction of king-made laws.[105] He also adds: 'As the king has obtained lordship he has to be obeyed. Polity depends on him'.[106]

A leading Code.

Naradasmriti affords great help in deriving reliable knowledge of the line of evolution which Hindu law and jurisprudence had pursued during the remarkable era of the *Dharmashastras*, it being in point of time the last of three leading Codes. Bryce has observed: 'The law of every country is the outcome and result of the economic and social conditions of that country as well as expression of its intellectual capacity for dealing with these conditions'. There are intrinsic as well as other evidence to show that the work was compiled after there had been remarkable political, economic and social progress in the country, when the highest intellectual capacity of the people had already produced the philosophy of the *Upanishads* out of which had been developed the doctrine of *Karmayoga*.

Identity of this and other Smritikars not known.

The compiler of *Naradasmriti*, according to Dr Jolly, probably lived in Nepal.[107] This *Smritikar* seems to have attributed the authorship of his compendium to Devarshi Narada, one of the great *Rishis* of antiquity. The fact that the real identity of the author of this *Smriti* and other important *Smritis* are not revealed has baffled some writers and the question had at times been posed as to whether some of them were not dilettantes.

One reason suggested for this anonymity, a reason not very complimentary, was that by fathering their *Smritis* on ancient *rishis* in the opening stanzas of their works, they tried to get meretricious authority and age which would not otherwise have been their portion. The more acceptable reason for these jurist-theologians ascribing their works to other seems to be that they were unconcerned about personal fame and the fruits of their efforts and yet anxious to give the people standard works on *Dharma* when they fathered their Institutes on the time-honoured

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103 The country was often called Aryavarta and sometimes a part of it was mentioned as *Brahmavatra—Manusmriti* II, 17.

104 *Naradasmriti* XVII, 25.

105 Introduction I, 11–11.

106 'It is for the establishment of order that various laws have been proclaimed by kings. A royal order is declared to overrule such laws even'—*gariyo raja shasanam* XVIII, 24; XVIII, 25.

107 There is no reliable data for this opinion.

sages of the past some of whom were regarded as the 'first pathfinders'. The names of many great thinkers of the *Upanishads* remain similarly undisclosed.

Asahaya's commentary on *Naradasmriti.*

Asahaya, who is himself quoted with esteem in a number of treaties and digests, has written the *Naradabhashya* which is a very useful commentary on *Naradasmriti*. Asahaya lived in about the beginning of the seventh century and is probably the earliest of the leading commentators. A translation by Dr Jolly of the larger of the two versions of *Naradasmriti*, now generally accepted as the authentic text of the Code of *Narada*, was published in the *Bibliotheca Indica* in 1876. In his edition of *Naradasmriti* published in the *Sacred Books of the East Series*, Dr Jolly has used Asahaya's commentary. Asahaya shares with other early commentators the peculiarity of giving illustrations taken from everyday life of his period, with help to throw light on the practice of the working of the law, in those times. The available commentary of Asahaya has not been preserved in its original shape and is not complete.[108]

Parashara.

Parasharasmriti is mentioned in the enumeration of Yajnavalkya. Parashara also gives list of the lawgivers. Most of the names in Parashara's list are to be found in the enumeration of Yajnavalkya. He does not mention Yama, Brihaspati and Vyasa but includes instead Kashyapa, Gargya and Prachetas. The author of this *Smriti* appears to have adopted the name of a revered sage of antiquity who is referred to in the work as the father of Vyasa. *Parasharasmriti* deals only with the subjects of *Achara* and *Prayashchitta* and omits discussion of *Vyavahara*. Adverting to civil law, Parashara says that certain questions are to be determined by the decisions of a *parishad* or an assembly of the learned. This statement is interpreted by Mr Mandlik to mean that Parashara found the civil law of the *Smriti* so considerably modified by usage that he felt unsafe to refer his readers to those works, and therefore invested the verdicts of the *parishads* of conclaves of the learned versed in the current usages of the country with great authority.[109] Whatever be the reason for the omission by Parashara to treat specifically or *Vyavahara* in his work, it does appear that Parashara recognised current usages and customs of the people as transcendent law.

Madhaviya.

Madhavacharya's commentary on this *Smriti* is known as *Parashara Madhaviya* and is often mentioned as the *Madhaviya*.[110] Being a great scholar and also the Prime Minister of the great Vijaynagar kingdom, his work is accepted as one of the leading

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108 *SBE*, Volume XXXIII.

109 See *Parishad, Hindu Law*.

110 An English translation of the law of inheritance and succession from this treatise was published by AC Burnel. Other translations of the same are to be found in the publications of Ghosh, *Principles of Hindu Law*, Volume II, 3rd edition., 1917; Setlur, *Collected Texts on Inheritance*, Volume II.

authorities in the South.[111] Madhavacharya in his commentary deals with *Vyavaharapada* as well as the religious matters treated in the *Smriti* of Parashara.

Brihaspati.

The *Smriti* of Brihaspati is unfortunately not available in its integrity. Brihaspati like Narada who preceded him is comparatively very unorthodox. A comparison of his work with *Naradasmriti* and other relative criteria would suggest that it must have been compiled one or two centuries after Narada and at a time when in many branches of it the law had made further strides in its line of development. There are verses on the subject of 'concerns of a partnership' which illustrate this, though it is clear from the available texts that several of *Brihaspati's* rules on the subject have not been traced. The element of mutual agency in partnership which is a product of the same commercial necessities as ordinary agency requires that the business must be carried on by the partners or some of them acting for all. Brihaspati rules that every partner is in contemplation of law, the general and accredited agent of the partnership: 'Whatever property one partner may give (or lent) authorised by many, or whatever contract he may execute, all that is considered as having been done by all'.[112] He also deals with the right of a partner to be indemnified by the firm in respect of act done by him in an emergency for the preservation of the common stock and the obligation of a partner in his turn to indemnify his partners for any loss caused to them by his negligence.[113] Brihaspati distinguishes civil wrongs and crimes from all titles of law: *Dvipado vyavaharashcha dhanahinsa samudbhahavah.* The content of the incomplete and somewhat scattered rules of this *Smriti* available to us is abundant proof of the reason for the lasting influence of this illustrious authority of Hindu law. Brihaspati gives a number of general principles on a variety of subjects. He is in full accord with the salutary rule that the meaning of words would be such as has been received by common acceptation,[114] and the preferable exposition of any rule of law should be that which is approved by constant and continual use and experience; *optima enim est legis interpres consuetudo.*

Rules of adjectival law.

The rules of procedure and particularly those relating to pleadings laid down by Brihaspati are a great advance on the adjectival law in operation before his time and which had to be gathered from the sporadic rules of Manu on matters of procedure, the *Yajnavalkyasmriti* and the more elaborate rules in the texts of

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111 *Subbaramayya* v *Vankatasubbamma,* (1941) ILR Mad 989, p 1000 ; *Collector of Madura v Moottoo Ramalinga,* (1868) 12 MIA 397, p 437 .

112 *Brihaspati,* XIV, 5 (S.B.E. Volume XXXIII).

113 *Brihaspati,* XIV, 9, 10, (S.B.E. Volume XXXIII).

114 'The sense attached by current usage is to prevail'—*Rudhiyogamapaharati.*

Narada. Brihaspati speaks of four stages of a judicial proceeding: the filing of the plaint; the filing of the reply; trial of the suit having regard to burden of proof and passing of the decree.[115] The requirement of a plaint stressed by Brihaspati are that the pleading must be precise in words; reasonable; brief; rich in content; unambiguous; free from confusion; and devoid of improper arguments.[116] Of a written statement he says: One should not cause to be written and answer which wanders from the subject; or which is not to the point, too confined or too extensive, or not in conformity with the plaint, or not adequate or absurd or ambiguous.[117] Disposal of a suit *ex parte* was discouraged and if possible, the defendant was by processual law to be compelled to make his reply.[118] One of the processes adopted has its analogue in the writ of early English law *Capias ad respondendum* under which an absconding defendant in a civil action was arrested or obliged to give special bail. *Brihaspati* laid down that it should be only in case of failure of the process of law that the decision should go against the defendant and give to the plaintiff the relief sought by him.[119] He gives a set of rules regarding witnesses and documentary evidence and principles of *estoppel*[120] and adverse possession.[121]

Insistence on precision.

The author of this *Smriti* appears to have adopted inappropriately the name of Guru Brihaspati the venerated *Rishi* who according to Hindu mythology was the preceptor of the God and whose name was immortalised by associating it with *Brihaspati*, the largest planet of the solar system. That planet, it may not altogether be amiss to observe, is believed to be concerned with law. Brihaspati does not state masses of verses to be learnt by rote. He does not revel in the use of words but prefers exactitude and his definitions are definitive. His rules are coherent and consistent and he does not give any undifferentiated details. Many of his original pronouncements are vested with concrete significance and he takes a spinozistic view of the whole system of law. Though available in parts, which are incomplete, and in some cases broken of, it is one of the most readable of the *Smritis* and is written in an arresting style. There is remarkably skilful use of assonance in some of the verses of Brihaspati but nothing is given upto the exigencies of metre. In a verse of fundamental importance he perfected the doctrine about invoking the aid of equity and enjoined that a decision must not be made solely by having recourse to the letter of the written codes.[122] M Kane has

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115 *Brihaspati*, III, 12 (*SBE*, Volume XXXIII).
116 *Brihaspati*, III, 5, 6, (*SBE*, Volume XXXIII).
117 *Brihaspati*, IV, 8 (*SBE*, Volume XXXIII).
118 *Brihaspati*, IV, 2, 3, (*SBE*, Volume XXXIII). There are some texts on procedural law, which are ascribed both to Brihaspati and Katyayana.
119 *Brihaspati*, IV, 4 (*SBE*, Volume XXXIII).
120 *Brihaspati*, IX, 9.
121 *Brihaspati*, Chapter IX.
122 *Kevalam Shastramashritya na kartavyo hi nirnayab: yuktibeen vichare tu Dharmahanih prajayate.*

observed that the complete *Smriti* 'will be, when discovered, a very precious monument of ancient India, exhibiting the high watermark of Indian acumen in strictly legal principles and definitions'.[123] Dr Jolly undertook the arduous task of reconstruction of this *Smriti* from the available sources and collected and arranged the legal texts (verses) attributed to Brihaspati from the works in which they were quoted. An English translation of those verses is published in the *Sacred Books of the East Series*. Dr Jolly has observed: 'The fragments of Brihaspati are among the most precious relics of the early legal literature of India'.[124]

Katyayana.

The *Smriti* of Katyayana also is unfortunately not available in its integrity. Texts from this *Smriti* are copiously quoted in all the principal commentaries. A noteworthy feature of this *Smriti* is the variety of subjects dealt with in it and the rules of adjectival law there stated and which go to show the progress made in that branch of the law by the time of Katyayana (fourth or fifth century AD). The topics dealt with by Katyayana have a wide range. In procedural law they range from judicature and pleadings to means of proof and probative value of different types of evidence. Another notable feature of this *Smriti* is that the king despite his lordship over the land is not accepted as the owner of the soil. Ownership in land is declared to belong to the subject and the king is not entitled to claim anything more than one-sixth of the produce by way of land revenue.[125] Katyayana is emphatic when he says that the king should resort to the dictates of the *Dharmashastra* and exhort him not to be guided by considerations of policy favoured by the *Arthashastra*.[126] The most striking feature of this *Smriti*, however, is its treatment of the law of *stridhana*. The whole law relating to the rights of a woman over her *stridhana* has been evolved from a text of Narada and certain texts of Katyayana.[127] The available verses of Katyayana relating to woman's property and her power of disposal over the same became the subject-matter of elaborate critical study by later commentators as he was probably the first of the *Smriti* writers to discuss the subject in some details. There is discernible here a blend of empiricism and rationalism.

Rules of adjectival law.

There are many interesting verses of Katyayana dealing with adjectival law. Rule of the law of pleading from *Katyayanasmriti* quoted by the commentators clearly go to show that this *Smriti* marks an advanced stage of development in adjectival law. In a verse in the *Mitakshara*, Katyayana is quoted as enumerating the form and nature of a reply (written statement) 'a confession, a denial, a special exception and a plea of former judgment (*res*

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123 Volume I, p 207.
124 *SBE*, Volume XXXIII, p 211.
125 *Bhootanam Swamitwam.*
126 *SBE*, Volume XXXIII, p 271.
127 See § 113.

judicata) are the four sorts of answers'.[128] Katyayana is more liberal than his predecessors in the matter of allowing amendments in pleadings. In considering probative value of evidence Katyayana states that positive oral testimony should carry more weight than a mere inference and documentary evidence speaks louder than oral testimony.[129] His treats of judicature at some length and lays down the requisite qualifications of a judge[130] and jurors who it seems assisted the judge in certain types of cases, both civil and criminal. In dealing with adverse possession and limitation he draws the necessary distinction between possession *de facto* and mere ostensible possession by any person amounting really to custody.[131]

Wide appeal of this Smiriti.

There are numerous verses of Katyayana which bear the impress of the rules laid down by Narada and Brihaspati and it is clear that he has rephrased, clarified and expanded a number of texts from their *Smritis*. Katyayana maintains unimpaired and distinctive qualities of the *Smriti* of Brihaspati to which he freely refer. His exposition is authoritative and remarkable for its freshness of style and vigorous approach. There can be little doubt that this *Smriti* must have been brought into line with current law. It must have commanded a wide appeal as may readily be gathered from the profuse manner in which it has been quoted in all the leading commentaries.[132] The *Smriti Chandrika*[133] alone, it has been reckoned, quotes nearly six hundred verses of Katyayana. The arduous task of collecting all the available texts of Katyayana from numerous commentaries, and digests was accomplished by Mahamahopadhyaya Kane who collated and published in 1993 about one thousand verses of the *Smriti* on Vyavahara with an English translation.

Other material *Smritis*.

There are number of other *Smritis* none of which can be said to have come down to us in a complete form. Praiseworthy efforts and research by Western and Indian jurists and scholars during the last hundred years have resulted in the collection of a number of old manuscripts. Unfortunately only fragments of some of these *Smritis* have been traced and in case of some others all that we have are isolated references to and stray quotations from them in the commentaries and digests.[134] The authentic existence of most

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128 *Katyayana* describes these four answers in detail; Narada 1, 4.

129 *Anumanad guruh sakshi: Sakshibhayo likhitam guruh.*

130 Some of these are: he should be well-equipped in law; impartial; balanced; firm, temperate; industrious; free from anger; merciful and intelligent.

131 Enjoyment by any such person does not create any title in him—*Bhogat Tatra na siddhi syat.*

132 There are some texts which are ascribed both to *Brihaspati* and *Katyayana.*

133 See *Smriti Chandrika*, Introduction to the book.

134 In the seventh century AD, Hsuan-tsang, the most famous of the Chinese travellers, who came to India, and qualified as a Master of Laws at the Nalanda University, wrote in a letter to an Indian friend 'Among the *Sutras* and *Sbastras*, that I Hsuan-tsang, had brought with me I have already translated—in all thirty volumes'—Dr PC Bagchi, India and China. Hsuan-tsang spoke highly of the administration of justice in India. A number of works taken by him were lost on the way.

of these in not in doubt in view of the fact that they are mentioned in other *Dharmashastras* and referred to as recognised authorities by the commentators. Of these mention may be made of the *Smritis* of Vyasa, Samvarta and Devala. Vyasa and Samvarta are included in the enumeration of Yajnavalkya.[135] Vyasa and Devala appear to have adopted the names of very ancient and venerable seers mentioned in Hindu scriptures.[136] The *Smriti Chandrika* is plentiful in citations from their works.[137] Apararka also quotes freely from these *Smritis* in his massive treatise.[138] According to Vyasa all wealth given to a wife by her husband was her absolute property.[139] As to the contents of judgment and decree of a court, he states that it should give an abstract of the pleadings, of the evidence on record, discussion of the questions that arise for determination and the law applicable to the same. Devala is one of those progressive and liberal *Smritikars*,[140] who recognised remarriage of women in certain events.[141] Texts from his *Smriti* and particularly those relating to partition of heritage and succession have been quoted in a large number of works and in numerous decisions of courts. Texts from the *Smriti* of Samvarta are cited in many works. This *Smritikar* laid down some equitable rules relating to the law of interest.

Arthashastra of Kautilya.

No conspectus howsoever brief of the sources from which knowledge of Hindu law may be derived and of the stages of its legal literature can omit to notice the *Arthashastra* of Kautilya who according to the most firmly established tradition was the celebrated Chanakya whose praenomen was Vishnugupta. The work is not a Dharmashastra but a masterly treatise on ancient Indian polity and a veritable reservoir of rule *inter alia* relating to the duties of a king, his administration including administration of justice, laws, courts of law, legal procedure, taxation, rights of women, marriage, divorce and numerous other matter would from the subject-matter of philosophy,[142] sociology, economics and hygiene.

In discussing the duties of a king, Kautilya said:

> In the happiness of his subject lies his happiness; in their welfare his welfare; whatever pleases himself he shall not consider as good, but whatever pleases his subjects he shall consider as good.[143]

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135 See *Smritikars*, Introduction to the book.

136 *Bhagavad Gita Discourse*, X, 13.

137 See *Smriti Chandrika*, Introduction to the book.

138 *Ibid.*

139 *Yachcha bhartra dhanam dattam sa uyathakamaam apnuyat.*

140 He is mentioned in the list of *Smritikars* given in the *Padmapurana*: The *Padmapurana* lists 36 compilers of law. The name of Arti mentioned in *Yajnavalkyasmriti* is not mentioned. To the other 19, are added Marichi, Pulastya, Prachetas, Bhrigu, Narada, Kashyapa, Vishvamitra, Devala, Rishyashringa, Gargya, Baudhayana, Paithinashi, Javali, Samantu, Parashara. Lokakshi and Kuthumi.

141 See Introductory Note to The Hindu Marriage Act, 1955.

142 Kautilya speaks of philosophy as 'the lamp of all sciences, the means of performing all the works, and the support of all the duties'.

143 Bk I, Ch. XIX, para 39.

Arthashastra means the science of polity. The word '*Artha*' is at time understood in a mundane and derogatory sense, but the connotation of Arthashastra is of *dandaniti* or the science of government. The compendium deals with matters worldly as distinguished from religious and principally with the State and its governance. Kautilya stresses the importance of *dandaniti* and observes that according to the School of Ushanas, 'there is only one science and that is the science of government; for they say, it is in that science that all other sciences have their origin and end'. A number of Kautilya's precepts and maxims having bearing on the welfare of the state and the king are founded solely on considerations of policy. With scientific application of principles of utilitarianism, he builds up his theory and science of governance. Some of his tenets proceed on the assumption that human nature consisted not of social benevolence but of self-love, the instinct of self-preservation and of self-seeking activity. Like Hobbes, the English political philosopher, he would have the State supreme in all matters affecting the mutual relations of men and like the Leviathan encompass all living beings. He endorses empiricism in Philosophy and utilitarianism in politics and law. In some maters of politics he endorses unscrupulous statecraft like the Florentine author of *del Principe*. It is not necessary, however, to refer here to any of his Machiavellian propositions on the subject of policy.

Monumental work.

The authentic text of the Arthashastra of Kautilya—although it was mentioned and extracts from it were quoted in numerous ancient works and historical monographs—was not available until its discovery in 1909 when it was translated and published by Dr Shamasastri. Dr Jolly and Dr Schmidt also brought out an edition of Kautilya's *Arthashastra*. This monumental work has since its first publication started controversies about the work itself, its date and the identity of its author. Most historians are agreed that it was Vishnugupta Chanakya and author of Kautilya-Arthashastra who successfully helped and guided Chandragupta Maurya in establishing a mighty empire in the 4th century BC. Megasthenes, the Greek ambassador at the court of Chandragupta, Justin the Greek writer and some others refer to Chandragupta as Sandrocottos. When, Alexander conquered Punjab a large part of Northern India remained under the sway of the last of the emperors. The Nandas were exterminated by Chandragupta, who also defeated Seleukos, the general of Alexander, who on the death of Alexander had inherited the eastern countries conquered by the latter. Justin and many historians are agreed that India shook off the yoke of servitude soon after the death of Alexander in 323 BC, and that the author of this liberation was Chandragupta. In his work Kautilya points out how foreign ruler drains the country of its wealth (*apavahayati*) and squeezes out of it as much as possible by exaction and taxation (*Karshayati*). At the end of his work Kautilya claims that he has liberated the country from misrule and further states: 'Having seen discrepancies in

many ways on the part of the writers on the *Shastras*, Vishnugupta himself has made (this) *Sutra* and commentary'. His approach being always practical, he is averse to theoretical speculations. He does not offer his homage to a number of earlier doctrines in matters of law and carries his legal propositions to their logical consequences.

Edicts of kings and Dharmashastras.

One of the controversies that arose after the discovery of the *Arthashastra* was whether at any time king-made law had higher authority than the law promulgated in the *Dharmashastras*. Some scholars were emphatic in their view that such was the case. The relevant text in the *Arthashastra* is: 'Sacred law (*Dharma*), evidence (*Vyava-ḥara*), History (*Charitra*), and edicts of king (*Rajashasana*) are the four legs of law. Of these four, in order, the later is superior to the one previously named'.[144] The question really falls within the purview of legal history. It may not be amiss, however, to observe that the *Arthashastra* was written at a period in the history of India during which law and politics were not accepted as wholly and strictly controlled by ancient rules of *Dharma* but as matters to be dealt with severally and freed from religious domination. In actual practice the edicts and ordinances of the powerful Mauryan emperors like Chandragupta and Ashoka[145] and the kings who succeeded them, were from their very nature and by reason of the sanction behind them, bound to be accepted and enforced without any challenge even when they did not accord with the *Smriti* law. Administration of justice (*Danda*) vested in the King, and those emperors and kings laid down numerous law according to their own judgement and to suit the felt necessities of the people over whom they ruled at a time of remarkable political, economic and social progress. Yajnavalkya, although he does not recognise the authority of king-made law does refer to the same: *Dharmo rajakritaschayah* meaning, 'the law that is promulgated by the sovereign'.[146] Similarly Narada, as has already been pointed out,[147] concedes the high authority and sanction of king-made laws. Kautilya himself subscribes to the view that the king and the laws were created by the people and that laws were of popular origin. According to him, the king at the time of his coronation affirmed that his prerogatives and powers emanated from the people and his oath was really an oath of service to the people: 'May I be deprived of heaven, of life, and of progeny, if I oppress you'. Narada, after stating that the king had been appointed to administer justice and decide lawsuits, adds 'Avoiding carefully the violation of either the sacred law or the *Arthashastra*, he should conduct the trial attentively and skillfully'.[148] This and other relevant data would seem to indicate that as

144 III, Chapter I, para 150.
145 See *Dharma*, Introduction to the book.
146 II, 186.
147 See p 29.
148 I, 37.

far as possible the edicts and ordinances of the kings so operated as not to disturb any fundamental concepts or rules of law embodied in the *Dharmashastras*, and it would seem from the *Arthashastra* itself that theoretically at least Kautilya regarded king—made law and rescripts as a set of rules and announcements operating within the matrix and framework of the traditional law embodied in the *Dharmashastras*.

Not a source of law.

The work is not a *Dharmashastra* and is not to be understood as a source of Hindu law. Its very importance, however, is that it throws a flood of light on a number of matters including law and its administration before the time of the metrical *Smritis*. It gives invaluable information on a variety of subjects such as social stratification and organisation of matters of Administration, internal and foreign, civil, military, commercial, fiscal and judicial. The work is divided into 15 Books (*adhikaranas*) and 150 chapters, which are admirably arranged. Book III deals with *Dharmasthiya* that is with matters 'concerning law'. In Book IV are discussed numerous matters affecting administration of justice including 'measures to suppress disturbance to peace', crimes and punishment in case of various offences. It may be of interest to note that some of the matters treated in this masterly compendium relate to municipal administration; co-operative undertaking; juvenile delinquency; investigation in case of sudden death; vagrancy; and superintendence of slaughter-houses, liquor shops, passports, etc. Punishments prescribed for certain offences relating to morality and social hygiene, were severe and in some cases gruesome and unspeakable. Caste entered in a conspicuous manner and privileges and the disabilities of caste are reflected in the nature of offences mentioned in the *Arthashastra* and the punishments to be meted out to the offenders. Kautilya, however, adds:

> Whoever imposes severe punishment becomes repulsive to the people; while he who awards mild punishment becomes contemptible; but whoever imposes punishment as deserved becomes respectable;... punishment when ill awarded under the influence of agreed or anger or owing to ignorance, excites fury even among hermits and ascetics dwelling in forests, not to speak of householders.

Styles of a Precisist.

The work is in the *Sutra* style. Kautilya prefers prose to verse and comparatively the number of verses in the *Arthashastra* is not large. There is economy of language, which is easily perceptible. There are some expressions, which the author admits to have been coined by him, and some expressions which are antiquated. The work bears on its face the evidence of skilful and masterly treatment and clearly shows that it is by and authority second to none on the subject. The style is singularly lucid and at the same time felicitously forceful. Kautilya's generalisations are as precise as possible and many of his observations are of absorbing interest.

Judicature.

Judicature was a head to which some importance was attached by the authors of the metrical *Smritis* though it is from the *Arthashastra* of Kautilya that it is possible to get more vivid and detailed information on the subject. Constituted judiciary as now understood did not exist in the *Vedic* era and there is hardly any data available on the subject of judicature from the literature of the pre-*Sutra* period. In ancient India, the bulk if not the whole administration of justice was carried on in popular assemblies known as the *Sabha* or *Samiti*. These were deliberative bodies assembled for discussing public business and also served as the forum for the purpose of judging the cases which were brought to them.[149] The king mentioned in the very ancient works, is not a ruler of a large state but the head of any autonomous clan. There is no reliable history of the territorial kingdoms, which flourished before the establishment of the empire of Mauryas with its strong central government and duly constituted courts of law. Nor do we find any exposition of the subject of judicature in the *Dharmashastras*. Gautama, the earliest among the authors of the extant *Dharmasutras*, speaks only of the exercise of *danda* and of administration of justice by the king in conformity with the Institutes of the sacred law.[150] Vasishtha enjoins the king to punish those who transgress the law and inflict punishment in accordance with the precepts of the sacred records and with precedents.[151] There is no reference to any centralised judicial system and there seems to have been little interference by the king with the traditional local tribunals which functioned in matters of local importance including dispensation of justice.

Sabha or Samiti.

Administration of justice in the time of Kautilya.

The *Arthashastra* of Kautilya was written when India was politically and administratively unified and there was consolidation of power in the hands of the emperors[152] whose writ ran in the whole country. Here we have a comprehensive account of administration which shows that no *a priori* limitation was set on any State activity. Kautilya gives a vivid description of the king's courts of justice. There was the court for the *sangraha* which was for a group of ten villages; there was the court for the *dronamukha* which was for a group of four hundred villages; and there was the court for the *sthaniya* which was for a group of eight hundred villages; and there was above them all the court presided over by the king's judges. A remarkable feature of the treatment of the subject by Kautilya is that he does not attach any importance to the local jurisdictions which had been functioning for many centuries. He does not expressly mention any supplementary jurisdictions and only speaks of the establishment of the king's

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149 A very exalted position was ascribed to the *Sabha* and *Samiti* in the *Vedas*: *Sabha cha ma samitischavatav prajapaterduhitarau samvidane* (*Atharvaveda,* VIII, 12).

150 XI, 28; XI, 19.

151 XIX, 8, 10.

152 See *Smritikars*, Introduction to the book.

courts. The traditional local authority (village community) represented a national system of local self-government and local jurisdiction. It would seem that though a network of king's courts were established the local jurisdictions had not disappeared. There was certain amount of institutional continuity although the king's courts were naturally superior in their universal extent and stability and the sanction behind them.

Hierarchy of Courts mentioned in the *Smritis*.

During the *Smriti* period there was remarkable progress in and unification of law both substantive and adjectival. This is noticeable in any texts of Manu and Yajnavalkya but we get a much better idea of the adjectival law including judicature from the *Smritis* of Narada, Brihaspati and Katyayana. Manu speaks of the royal court (*Sabha*) staffed by experienced councillors and directs the king to administer justice in the *Sabha* and to decide cases which fall under the eighteen titles of law according to principles drawn from local usages and from the Institutes of the sacred law.[153] Manu also speaks of administrative units consisting of one, ten, twenty, hundred and thousand villages[154] and from this and other texts of these *Smritikars* we get some information about the hierarchy of courts with the king as the final arbiter. The tribunals set forth by Yajnavalkya[155] and other later *Smritikars* as *Kula, Shreni* and *Puga* were not forums of private arbitrament but they functioned as tribunals noticed and approved of by the leading *Smritikars* and accepted as part of the judicial machinery both by the king and the people. Broadly speaking *Kula* means an assemblage of persons of the same family or community or tribe or caste or race. The meaning of the expression in the present context is a family council. However, the word 'family' is to be understood as one of wide import and as inclusive of members of a caste of tribe. *Shreni* means a corporation or company of artisans following the same business: 'It also means a guild or association or traders in any branch of commerce. It may be observed *en passant* that by the time of Yajnavalkya there was unprecedented progress in trade and industry and we read of Indian merchantmen sailing the seven seas. *Puga* in its broad sense means an association or a union or an assembly. The expression in the present context has the element of habitance and means persons living in a village or town or city. Narada uses the parallel expression *gana* instead of *puga*. The leader of the local assembly was designated *ganapati*. Narada says: 'Gathering (*kula*), corporations (*shreni*), assemblies (*gana*), one appointed (by the king) and the king himself, are invested with the power to decide lawsuit; and of these, each

153 *Manusmriti*, VIII, I, 3-8: Also VIII, 9–11.
154 *Manusmriti*, VII, 115.
155 *Yajnavalkya*, II, 30.

succeeding one is superior to the one preceding in order'.[156] Brihaspati also refers to this network of courts. He speaks *inter alia* of courts of itinerant judges functioning from place to place and describes the court headed by king's chief justice as *mudrita*.[157] The last mentioned court had the privilege of using the king's seal. He states: 'Let the king or a member of a twiceborn caste officiating as Chief Judge try causes, acting on principles of equity, and abiding by the opinion of the judges, and by the doctrine of the sacred law'. 'When a cause has not been duly investigated by *Kula*, it should be decided after due deliberation by *Shreni*; when it has not been duly examined by *Shreni* it should be decided by *Puga*; and when it has not been sufficiently made out by *Puga*, it should be determined by appointed judges. Judges are superior in authority to *Kula* and the rest; the chief judge is placed above them; and the king superior to all'.[158]

The king's court was the ultimate court and, in theory, presided over by the king, though in practice it must have mostly been headed by the Chief Justice (*pradvivaka* or *dharmadhyaksha*).[159] These different component parts of the judicial machinery show that even under a centralised strong government, considerable autonomy was left in matters of local and village administration and in matters solely affecting trader's, guilds, bankers, and artisans. The stubborn vitality of these functional jurisdictions of the village community and the guild of merchants withstood strong central government and anarchy alike, because they were deep-rooted in tradition. It is of some significance to note that modern legislative theory encourages arbitrament by domestic forum in case of members of commercial bodies and associations of merchant and-legislation in India confers jurisdiction of village panchayats to try certain causes. What at first sight may appear to have been parallel or competing jurisdictions were really functional organisations rooted in autonomy and so dovetailed as to remain homologous with the supreme authority of the king's courts in the administration justice. It is not possible to say from the texts of the extant *Smritis* or from the expositions of the leading commentators that we have the complete picture of the subject; and it is true that none of the extant treatises gives complete rules of adjectival law. However, it would be inaccurate to say that they give nothing more than haphazard collections of precepts and precedents as it would be inaccurate to suggest that they give an adequate and exhaustive code of coordinated rules affecting judicature and procedure.

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156 *Naradasmriti*, Introduction, p 29.
157 *Brihaspati* I, 2, 3 (*SBE*, volume XXXIII).
158 *Brihaspati* I, 24, 30, 31 (*SBE*, volume XXXIII).
159 *Naradasmriti*, Introduction, p 21.

Adjectival law scanty on some topics.

However ponderous or exhaustive a code might be, it cannot provide for all varieties of matters or all situations that might crop up for consideration and this is particularly so of rules of procedure. Attention has already been invited to some important and significant rules of procedure and to the development made in this branch of the law by the time of Narada, Brihaspati and *Katyayana*. For all that it must be conceded that while the leading *Smritikars* gave elaborate rules on matters of substantive law, the rules of procedure which may be gathered from the extant work do not embrace all the heads of procedural law and are indeed wanting in fullness and even scanty on some topics. One reason for this paucity of rules seems to be that some of the topics were regarded as matters to be governed by practice of the court rather than by inflexible and mandatory rules of procedure. There are some texts of the *Smritikars* which go to suggest that the court ought not to be bound and tied by too many rules of procedure and that every court is the master of its own practice *Cursus curiae est lex curiae*. The provisions contained in these ancient treatises do not give any comprehensive code of procedure and there are a number of rules which must seem defective when judged by modern concepts. A critical summation of the true position has been given by Sir S Varadachariar, the eminent jurist:[160]

> Whenever, wherever and so far as circumstances permitted attempts were all along being made...to administer justice broadly on the lines indicated in the law books. The defects and deficiencies, sometimes serious, must have been the result of the geographical features and the political history of the country. There were bound to be some variations and even conflicts between the texts of one *Smriti* and another or even between some texts in the same *Smriti*.

Conflicting texts, how dealt with.

The *Smritikars* themselves were conscious of this and tried to deal with the problem in the first place by declaring: 'That *Smriti* (or text of law) which is opposed to the tenor of Manu is not approved'.[161] In actual practice this maxim was not strictly followed and effect was at time given to texts of later *Smritikars* on the ground that they were more in accordance with approved usage or by availing of some principle of exegesis. Another rule of preference stated by Narada was that: 'in case of conflict between *Smritis* decision should be based on reason'.[162]

Narada supplemented this rule of his by stating that:

> Custom is powerful and overrides the sacred law.[163]

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160 Hindu Judicial System, p 258.
161 *Manvarthavipareeta ya sa Smritirna Prashasyate—Brihaspati*, XXVII, 3 (*SBE*, Volume XXXIII).
162 *Dharmashasra virodhe tu yuktiyukto vidhih Smritah*—IV, 40.
163 *Vyavaharo hi balavan dharmasten avahiyate*— IV, 40.

As far as possible attempts were made to reconcile the texts by taking the view that, the conflict was not real but only apparent.[164] At times an apparent conflict was resolved by taking the view, not without some difficulty, that the less favoured text properly understood was of the nature of a statement of fact and not any rule.[165] Where, however, the contradictions were patent and irreconcilable there was the option to prefer one of the contradictory matters.[166]

However, the most salutary rule of them all was stated by Yajnavalkya, who with his intrepidity and powerful sense of justice ordained that:

> Where two *Smritis* disagree, that which follows equity guided by the people of old should prevail.[167]

Nyaya, which in the context of this rule means natural equity and reason[168] was, therefore, to prevail in case of conflicting rules of law.[169]

Mimansakas.

However, even apart from cases of conflicting texts, the fixed and authoritative formulae of which the *Smriti* texts were embodiments suffered from the same defects to which any *litera legis* is subject. The *Mimansakas* gave rules of exegesis which, though primarily intended as aids for the interpretation of rules contained in the *Vedas* and other *Dharmashastras* relating to ceremonial observances and sacrifices, were applied, though not with uniformity, in construction of texts also of *Vyavahara* or municipal law. Assistance was derived in the task of interpretation from the rules of *Mimansa* of which Jaimini was the greatest exponent. Aid was also sought from the *Nirukta* of Yaska who is the earliest of the known exegetes. The *Mimansakas* were not merely exegetes but also logicians.[170]

Mimansa of Jaimini.

Some basic rules of exegesis.

When the language of a text was not only clear and unequivocal but admitted of only one meaning such language was regarded as best declaring the intention of the lawgiver and accepted as decisive.[171] Where, however, the meaning was not self-evident,

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164 One of the leading aphorisms of Jaimini is: 'Contradictions should not be too easily assumed'. He asserts that apparent inconsistencies are at times not actually so; they merely consist in difference of application— *Prayoge hi virodhah svat*— II, i. 9.

165 *Apastamba*, II, 6, 14, 13.

166 This was referred to as *Vikalparupatadhikaranam—Jaimini*, X, viii.

167 *Smrityorvirodhe nyayastu balvan vyavaharatah*—IV, 20.

168 In the case of early statutes, English jurists and lawyers often appealed to the 'reason of the law'; see *Bacon's Abridgment of the law*; Title Statutes. This way of interpretation, though not encouraged by rules of construction application to modern statutes is not, however, altogether unknown.

169 For conflict between *Smritikars*, see Introduction to the book.

170 In *Ramchandra v Vinayak*, (1914) 41 IA 290 , the Privy Council observed: 'The Hindu law contains its own principles of exposition, and questions arising under it cannot be determined on abstract reasoning or analogies borrowed from other systems of law, but must depend for their decision, on the rules and doctrines enunciated by its own law-gives and recognised expounder'. An observation to the same effect was made in *Ram Singh v Ugar Singh*, (1870) 13 MIA 373.

171 This rule of literal construction was referred to as the *Shruti* principle—*Nirapekshah revah shrutih.*

the sense could be gathered by availing of the principle of necessary implication.[172] Although the foremost rule and one repeatedly stressed by the *Mimansakas* embodied the cardinal principle of literal construction,[173] words of sufficient flexibility and words of doubtful import could be construed in the sense, which if apparently less correct grammatically, was more in harmony with the intent of the lawgiver. That intention where possible was to be gathered by recourse to the principles of syntactical[174] or contextual[175] construction. The *Mimansakas* have laid down some clear, logical and distinctive rules, which permit departure from the rules of literal construction and have also indicated the order in which those rules are to be applied.

Departure from rules of literal construction.

Those rules do not compare unfavourably with the rules stated in modern treatises on the subject of interpretation of status. Where not fettered by any mandatory rule, the judicial interpreter was free to accept that meaning of the text, which was supportable solely by the reason of the law. Then again resort was had to suppositions of law by inquiring into what was implied by the text and giving it more rational interpretation. This was akin to what the later Roman Jurists called *fictio juris*. Study of *Mimansa* was regarded as an integral and essential part of the study of the *Shastras*.

Construction agreeable to justice and reason.

Of Jaimini's *Mimansa*, Colebrooke observed:

> The logic of the *Mimansa* is the logic of the law—the rules of interpretation of Civil and religious ordinances. Each case was examined and determined upon general principles; and from the cases decided, the principles may be collected. A well-ordered arrangement of them would constitute the philosophy of the law, and this is, in truth, what has been attempted in the *Mimansa*.[176]

Tantra-Vartika of Kumarila.

Mention must here be made of the *Mimansa* treatise, *Tantra-Vartika*, the commentary of the versatile writer Kumarila Bhatta. The celebrated work of Kumarila is a commentary on certain important part of the *Mimansa-Bhashya* of Shabara Swami. Shabara's work treats of the *Purvamimansa Sutras* of Jaimini. The commentary of Kumarila is an encyclopaedic treatise and a veritable mine of information on Dharmashastra. Mahamahopadhyaya Sir Ganganath Jha's Translation of Kumarila's work was published in 1924 in the *Bibliotheca Indica*.

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172 Apadeva, author of a number of treatises on *Mimansa*, deals freely with this subject *(kalpya)*, which is covered by the principle of interpretation called *Linga*. Inference could be employed in settling the sense either of a word or sentence—*Shabadsamarthayam lingam*. The meaning derived by necessary implication is by adopting the principle of *lakshanartha*.

173 Where this primary rule governed a case, no other rule of constructon could be brought in aid—*Shruti linga vakya prakaranasthana samakhyanam samavaye paradaur-balyamartha viprakarshat*— Jaimini, III, iii 14.

174 Syntactical connection is referred to as the use of *vakya* principle: *Samabhivyaaharo vakyam*.

175 Construction by emphasising interdependence between passage is called *prakarana*—*Ubhayakanksha prakararnam*. The *Mimansakas* also laid stress on the importance to be attached to sequence—*Sandigdheshu vakyasheshat*—Jaimini I, iv 29.

176 *Miscellaneous Essays*, p 342.

Post-Smriti period.

In the history of Hindu law, creative and critical period succeed each other and it was the post-*Smriti* period during which Hindu law and jurisprudence reached a remarkable stage of progress and assimilation. If the productive era of the *Dharmashastras* was the golden age of Hindu law, then this was the period of critical inquiry, expansion and consolidation. The ancient aphorisms of the *Sutrakars* and the earlier *Smritis* were compiled when the spiritual motive dominated life. The *Smritis* though accepted as 'revelations remembered' were themselves partially based on usages and practices and did not profess to comprehend every aspect of *Vyavahara.* Questions of law were not decided by reference merely to the rules propounded by the early *Smritikars.* The salutary rule that in course of time had come to be accepted and emphasised by the *Smritikars* themselves, was that cases were also to be decided agreeably to such usages and customs as were approved by the conscience of the virtuous and followed by the people. This from its very nature contributed to the growth of Hindu law by introducing innovations and modifications in what was in theory attributed to divine precepts otherwise unalterable owing to their emanation from the deity. Usage when established outweighed the written text of law. The *Smriti* law had a rational synthesis and went on gathering into itself modified and revised concepts of jural relations and things.

Era of remarkable progress.

Commentaries.

An auxiliary to this process of development was the contribution of the commentators who did not hesitate to interpret and mould the ancient texts so as to suit the needs of a progressive society. Without claiming any delegated authority of claiming paramount power, they of their own initiative helped in the process of development that was going on. Questions grew up around situations, round matters of frequent occurrences and round the problems of interpretation and application that derive from every text of law. A comprehensive and homologous view of the contents of the *Smritis* required synthesising of what was at times presented in an unsystematic form and the bringing out of the mutual co-ordination or subordination of single texts and detached passages. The aphorism of the *Sutrakars* though not intrinsically obscure was often concise to excess and at times elliptical. Some of the rules of *Smriti* law expressed general principles without the necessary qualifications and exceptions and were therefore of the nature of propositions much too absolute. A number of rules were of the nature of maxims of the law, and had the merits and defects common to such maxims. Being brief and pithy, statements expressed in form of metrical redactions, they often constituted a species of legal shorthand requiring interpretation and exposition in the light of expert knowledge. Moreover, the fixed and authoritative formulae of which the *Smriti* texts were embodiments suffered from the same defects to which any *litera legis* is subject. Then again with so many recognised authors of the *Dharmashastras* differences and even some conflicts

of opinion on points of law were naturally to be expected. Reference has already been made to some of the principles of exegesis relied upon by the *Smritikars* themselves who realised the various difficulties in the way of evolving one system of law out of numerous *Smritis*.[177] Besides, the *Smritis* were not exhaustive. Points of law apparently not covered by the textual-law were naturally cropping up from time to time and many lacunae in the texts were clearly discernible. The commentaries being dissertations on law, had in the nature of things to take notice of all this. Under the guise of critical interpretations of the *Shastras*, the commentators resorted to construction by implication and inferences, or supplied such omissions, or did both. It was in this and in their task of reconciling some of the inconsistencies and occasional conflicts found in the *Smriti* texts and in their treatment of vague and ambiguous texts that the commentators really excelled. The import of some of the terms employed by the *Smritikars* was complex and the intimate and indissoluble connection, which existed between some of them, demanded dissertations, long, intricate and coherent. When dealing with the eighteen titles of law, which they felt, bound to recognise the commentators did not consider them as watertight compartments. They looked upon them as matters of classification and not necessarily legal treatment. In the task of interpretation, the rules of *Mimansa* were availed of by these commentators, but not invariably. What the commentators had recourse to were the principles of exegesis to be found in the *Smritis* themselves and the *Mimansa*; rules of logic (*Tarka*); dialectic philosophy (*Nyaya*); rules of grammar (*Panini*) and approved methods of construction. The cardinal rule or literal construction[178] and many of the crystallised exceptions to this rule discussed by modern English authors, with which exceptions laws in India are so familiar, were borne in mind by these commentators and many doubtful points were solved by suggesting the key to the true intent and meaning of the lawgiver. Nonetheless, difficulties did arise in the interpretation of texts not readily admitting of extended or restricted import and in getting over express texts the application of which had become obsolete. There can be no doubt that the commentators, at times, stretched points, took precepts out of their context and on occasions gave strained interpretations to rules. As far as possible, they tried to bring out the true import of the ancient texts, but at times, they made logic yield to convenience and clearness. Sometimes the reason given in support of an accepted construction would seem to be a sophism but their ingenuity was at times taxed to the utmost.

Arduous task of the commentators.

177 See *Smriti*, Introduction to the book.

178 Where a proposition laying down a mandatory rule was stated in clear terms, resort to extrinsic aid was not permissible. In such a case, 'considerations of reasons are of no avail'—*Vachane hi hetvasamarthye—Jaimini*, IV, i. 41. The popular saying is *'yavat vachanam hi vachanikam'*.

Development of Law by the Commentators and *Nibandhakars*.

Through the process of interpretation of the law, the declaration and exposition of the law, went on for a long time and naturally helped in the rational development of law. There were established courts, but there was no system under the Hindu law of reference to authoritative or persuasive judicial precedents. Instead, a very large number of commentaries and digests (*nibandhas*) were from time to time written during the post-*Smriti* period. The commentators did not at any time arrogate to themselves the position of lawmakers. Many of commentators with refined amenity of style disavowed all intention to make innovations. Their sole claim was that their works gave critical interpretations of the textual law of the *Smritis* and collated and declared the established textual and customary law.[179] Nevertheless their thought was to fashion the law into as perfect an instrument of justice as they could devise albeit within certain absolute formulae of the *Smriti* law and as far as possible by analogy to what was already settled and on lines parallel with usages and customs which were springing unconsciously from the habits and life of the people in their part of the country. Although in form merely commentaries on the ancient *Smritis* and complimentary to the same, these treatises were independent works which embodied the law current at the time. Some of the commentaries were written under the patronage of kings or at their instance and must have assumed importance on that score. In case of one or two works ascribed to kings, it would seem that the real author stood in the same position as Tribonian did to Justinian.

Systematic Building up of the Law.

In course of time, the commentaries appear to have acted with ever increasing force to give an impulse to the systematic building up of the law. The commentators amplified narrow provisions of law, rounded off their angles and added a mass of relevant matter thereby materially contributing to the process of self-development of the law. The veneration in which they were held and the acknowledgement of their scholarship was indeed so remarkable that their opinions and conclusions became law by acceptance. The commentators, although they rested their opinions on the *Smritis*, were explaining, modifying, enlarging and even at times departing from the letter of the *lex-scripta* in order to keep the law in harmony with their environments and the prevailing notions of justice and to suit the felt necessities of the times. The law was basically and essentially traditional law and rooted in custom. As a result, the process of development and assimilation continued and the law had to be gathered not merely from the ancient texts, nor solely from the commentaries but mainly from the latter and always having regard to rules of conduct and practices reflected in approved usage. So in course of time the law came to be ascertained and accepted in the main from the

Ex cathedra character of the Commentaries and Digests.

179 For instance, in treating of 'inheritance' Vijnaneshvara states: 'In this section of *Mitakshara*, the texts are mostly narrations of well-recognised usages'. II, 118, 119.

commentaries and digests of which the leading ones acquired almost *ex cathedra* character. Composed in different parts of India several of these gained ascendancy in those parts of the country where the authors were accepted as of pre-eminent authority. Facts of geography were massive and in different parts of the country different commentaries came to be referred to as the chief guides on law. The result was that the two principal schools of Hindu law, the *Mitakshara* and the *Dayabhaga* sprang into existence and furthermore where the *Mitakshara* prevailed, there came to be recognised a number of sub-schools of the parental authority.

Two Principal Schools of Hindu Law.

An account of the origin and development of the schools of Hindu law was given by the Judicial Committee of the Privy Council in *Collector of Madura v Moottoo Ramalinga.*[180]

Mitakshara.

The remoter sources of the Hindu law are common to all the different schools. The process by which those schools have been developed seems to have been of this kind. Works universally or very generally received became the subject of subsequent commentaries. The commentator put his own glosses on the ancient text, and his authority having been received in one and rejected in another part of India, schools with conflicting doctrine arose. Thus the *Mitakshara* which is universally accepted by all the schools except that of Bengal as of the highest authority, and which in Bengal is received also as of highest authority, yielding only to the *Dayabhaga* in those points where they differ, was a commentary on Institutions of Yajnavalkya; and the *Dayabhaga*, which wherever it differs from the *Mitakshara*, prevails in Bengal, and is the foundation of the principal divergences Between that and the other schools, equally admits and relies on the authority of Yajnavalkya. In like manner there are glosses and commentaries upon the *Mitakshara* which are received by some of the schools that acknowledge the supreme authority of that treatise, but are not received by all.

Dayabhaga.

The *Dayabhaga* School prevails in Bengal; the *Mitakshara* School prevails in the rest of India. These schools, born of diversity of doctrines, mark a new stage in the evolution of Hindu law. One of the main differences between these two principal schools of Hindu law relates, as has been pointed out later on in some detail,[181] to the law of inheritance. The meaning of the doctrine of *sapinda* relationship in the law of inheritance insisted upon by Vijnaneshvara whereby community of blood (propinquity) is to be preferred to community in the offering of religious ablations is the governing factor whereby under the *Mitakshara* law, the right to inherit arises. Under the *Dayabhaga*, the right arises from spiritual efficacy, that is, the capacity for conferring spiritual benefit

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180 *Collector of Madura v Moottoo Ramalinga,* (1868) 12 MIA 397. Also see *Jagmohan v Official Liquidator*, AIR 1956 All 145 .

181 See Chapter IV.

on the manes of paternal and maternal ancestors. Another distinguishing feature relates to certain incidents of the joint family. According to *Mitakshara* law, each son acquires at his birth an equal interest with his father in all ancestral property held by the father and on the death of the father, the son takes the property, not as his heir, but by survivorship.[182] The position of the son or grandson in the *Mitakshara* is somewhat similar to that of *sui heredes* who under the Roman law are regarded as having a sort of dormant ownership in the estate of their father ever during his lifetime. Their succession was not so much a succession as coming into the enjoyment of what in a sense had already partly belonged to them.[183] According to the *Dayabhaga* School, the son does not acquire any interest by birth in ancestral property. His rights arise for the first time on the father's death. On the death of the father he takes such of the property as is left by the father, whether separate or ancestral, as heir and not by survivorship.[184] Partition is another branch of law on which there is some radical difference between the two principal schools.

Sub-divisions of the *Mitakshara* School.

The *Mitakshara* is sub-divided into four minor schools:

(i) Benares School;

(ii) Mithila School;

(iii) Maharashtra or Bombay School (Western India); and

(iv) Dravida or Madras School (Southern India).

Benares, Mithila, Maharashtra and Dravida are old names of the territories in which these schools gained mastery. The Benares school covers practically the whole of Northern India[185] with the exception of the Punjab where the *Mitakshara* law has on certain points been considerably modified by custom. The Mithila School prevails in Tirhoot and certain districts in the northern part of Bihar. The Bombay School covers Western India, including the whole of the old presidency of Bombay as also the Berar.[186] The Dravida or Madras School covers Southern India including the whole of the old Presidency of Madras. These Schools differ between themselves in some matters of detail relating particularly to adoption and inheritance. All these schools acknowledge the supreme authority of the *Mitakshara*, but they give preference to certain treatises and to commentaries which control certain passages of the *Mitakshara*. This mainly accounts for the differences between them.

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182 But now, after the coming into force of The Hindu Succession Act, 1956, as held by the Supreme Court, this legal position has been materially altered; see notes under section 8 of that Act.

183 Digest 28. 2, 11, *Paulus*.

184 See Chapter XVII.

185 The Benares School prevails in Orissa—*Basanta Kumar v Jogendra Nath*, (1906) 33 Cal 371, pp 374, 375. The Benares School also prevails in the Central Provinces—*Ramchandra v Ramabai*, AIR 1930 Nag 267 ; *Bhaskar v Laxmibai*, AIR 1953 Nag 326 , *Udebhan v Vikram*, AIR 1957 MP 175 ; *Ramaji v Manoha*, AIR 1961 Bom 169 .

186 *Bajirao v Atmaram*, AIR 1930 Nag 265 .

Mitakshara of Vijananeshwara.

Mitakshara—a very modest title meaning a brief compendium—is a running commentary on the Code of Yajnavalkya,[187] and a veritable digest of *Smriti* law. It was written in the latter part of the eleventh century by Vijananeshwara, an ascetic also mentioned as bearing the name Vijnana Yogin. In *Mitakshara* which is more of a digest than a mere commentary on a particular *Smriti*, we find the quintessence of the *Smriti* law and its precepts and injunctions. The chief merit of the work consists in its comprehensive treatment of almost all important topics of the law and the synthesising of various *Smriti* texts. It is of supreme authority throughout India except in Bengal where the *Dayabhaga* of Jimutavahana is given paramount importance. In Bengal, the *Mitakshara* is more revered than followed but its authority is not questioned on points on which there is no conflict between it and the works prevalent there. The *Mitakshara* is given general predominance in all the four minor schools which are no more than sub-divisions of the *Mitakshara* School but in Gujarat, the island of Bombay and North Konkan, the *Mayukha*, a more modern treatise is allowed to compete with it and even regarded as an overruling authority on certain points; and in the *Mithila*, there are some deflections from the parental authority. Vijananeshwara analyses and discusses the tests of Yajnavalkya sometimes at considerable length. As the Privy Council has observed, he 'explains the meaning of recondite passages, supplies omissions and reconciles discrepancies by frequent reference to other old expounders of law'.[188] He has the great merit of being unpontifical and being easily readable.

Institutional treatise.

Mitakshara has, for more than nine centuries occupied a place of ascendancy and authority unique and unrivalled in the annals of legal literature. Vijnaneshwara was one of the greatest of the juristheologians who contributed to the making of Hindu law. The subjects he dealt with were reasonably well classified and he had no call to do what the canon lawyers were always doing. He did not take upon himself the task of endlessly arranging and rearranging particular instances in an endeavour to deduce principles. He rather emulated the example of Confucius, who had a thread along which his experiences slid. Even though his treatment of certain matters is exhaustive and sometimes elaborate, he is mostly concise and precise and true to the brevity designated in the title of the work. However, on some points which are indeed few his expressions are so brief that they do not afford adequate guidance and it may be said of them that they suffer from 'obscurity from too much precision' as Dumont phrased it while

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187 As to the importance of the *Mitakshara* and *Yajnavalkyasmriti*, and the juristic weight to be attached to the same, reference may be made to *Surjit Lal Chhabda v Commissioner of Income Tax*, [1976] 2 ITR 164 .

188 *Buddha Singh v Lattu Singh,* (1915) 17 Bom LR 1022 : (1915) 42 IA 208, pp 214, 220; (1915) 37 All 604, p 611 . As to Colebrook's translation of *Mitakshara*, reference may be made to *Shamlal v Amarnath*, AIR 1970 SC 1643 .

complaining of some of Benthams' expressions. He is imbued with the *generalia* of law and there is no *ipse dixitism* in his treatment of any point. Nor is there any antiquarian trifling or wild philosophy about his discussions. In his *Mitakshara* he produced a juridical work which is an institutional treatise. There can be little doubt that his treatise had from a very early time a large degree of practical influence on many branches of Hindu law. The very wide range of its authority was only due to its intrinsic worth. A number of commentaries were written on the *Mitakshara* itself of which mention may be made of the *Subodhini*[189] of Visveshvara Bhatta, and the controversial treatise of Balambhatta.[190] Nandapandita, an esteemed writer of the Benares School and the author of the *Vaijayanti*,[191] and a noted work on the law of adoption the *Dattaka Mimamsa*, had written a commentary also on the *Mitakshara*. Mention was made of this work by the Privy Council in *Buddha Singh v Laltu Singh*;[192] but their work has not been published nor has it been found in its integral form.

Mitakshara is the paramount authority of all the sub-schools.

It is of consequence to notice again that the *Mitakshara* holds sovereign sway in the whole of India except Bengal. The sectioning of the *Mitakshara* School into the four minor schools nominated Benares, Mithila, Bombay and Madras Schools, is no doubt of some importance and consequence but it is apt to create confusion and even lead to error if it is not fully appreciated that essentially there are only the two schools of Hindu law, the *Mitakshara* and the *Dayabhaga*. These minor schools are not born of any diversity of doctrines such as exists in case of the *Mitakshara* and the *Dayabhaga*. There is no disagreement on any fundamental or constitutive principle and the differences that are to be found are mainly the result of variant interpretations given by different commentators to some texts of the *Smritis* and particularly to certain tests in the *Mitakshara* and at times the result of conflict of opinion between different High Courts. It is also of importance to notice that, from some exceptions to be pointed out later, the commentaries and digests, to be immediately referred to as the leading authorities of these minor schools, were only intended to supplement the *Mitakshara* and not to replace or abrogate the same. Speaking broadly, therefore, the first thing is to inquire what the *Mitakshara* has laid down on the question under inquiry when it is not concluded by the judicial decision and then to turn to the other authorities. Error is almost sure to arise if this order of priority be changed. The first thing to be considered is what the *Mitakshara* states. When reference is made to texts from any of the recognised authorities,

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189 See *Mitakshara*, Introduction to the book.
190 *Ibid.*
191 See *Smritikars*, Introduction to the book.
192 *Buddha Singh v Laltu Singh,* (1915) 37 All 604, p 618 (PC).

it is always unsafe to examine a single paragraph or a single verse. It is necessary to see for what purpose the reference is to be made and with that view to turn to the verses immediately preceding the same and to study the whole chapter and in some cases several chapters of the same treatise.

Viramitrodaya of Mitramishra.

The *Viramitrodaya* of Mitramishra,[193] composed in the earlier part of the seventeenth century is a commentary on *Yajnavalkyasmriti* and accepted as an authority in many parts of India where the *Mitakshara* School prevails ranks as especial authority in the Benares school.[194]

In *Girdhari Lall* case the Judicial Committee of the Privy Council observed:

> Adhering to the principles which this Board lately laid down in the case of *Collector of Madura v Moottoo Ramalinga*,[195] their Lordships have no doubt that the Viramitrodaya... is properly receivable as an exposition of what may have been left doubtful by the *Mitakshara*, and declaratory of the law of the Benares School.[196]

Where, however, the *Mitakshara* is clear on a point, it must not be overlooked that the *Mitakshara* is the guiding authority of the Benares School and indeed of every other sub-school.[197] The *Vyavahara* part of the treatise is sub-divided into four parts. The first treats of judicature and procedural law. The second treats mainly of the law of evidence. The third division relates to the 18 topics of litigation and the last gives some rules of criminal law. Mitramishra expresses profound respect for Yajnavalkya whom he always calls the lord of the sages (Yogeeshwara).

Last of the outstanding commentaries.

Mitramishra is a voluminous writer and master of analysis. Though on certain points, which are indeed few, his analysis is half-illuminating and half-obscuring. He was determined to use hard and empirical terms in his disputations with the writers of the *Dayabhaga* School and in his criticism of the reasoning of those with whom he was at loggerheads. A controversialist of no mean order, he does give the impression that he sometimes deliberately chose to indulge in barren logomachy. This pugnacity disregarded, there can be no doubt that in his very notable commentary there is reliable discussion of the

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193 An English translation of the law of succession from *Viramitrodaya* called *Partition of Heritage*, was published by Gopalchandra Sarkar Shastri in 1879. Other translations of parts of the treatise have also been published.

194 *Collector of Madura v Moottoo Ramalinga*, (1868) 12 MIA 397, p 438 ; *Jagannath Prasad v Ranjit Singh*, (1898) 25 Cal 354, pp 367–368 .

195 *Collector of Madura v Moottoo Ramalinga*, (1868) 12 MIA 448, 466. Its value and importance has been repeatedly recognised by the Privy Council—*Girjabai v Sadashiv*, (1916) 43 IA 151, p 159 .

196 *Jagannath Prasad v Ranjit Singh*, (1898) 25 Cal 354, pp 367–368.

197 In *Moniram v Keri Kolitani*, (1880) 5 Cal 776, pp 788, 789, the Privy Council observed that the *Viramitrodaya* may be referred to in Bengal in cases where the *Dayabhaga* is silent. In practice, in Bengal, this work is rarely relied upon. See p 58, for the authorities of the *Dayabhaga* School.

law on every useful subject and thorough exposition of every point taken up by him. The work is documented with reference to most of the earlier writers. Of the utility of the work there seems no end because for each dipping, one finds some useful discussion on the point under inquiry, Mitramishra does full justice to his themes and his work saves much research because the enormous task of research is performed by Mitramishra himself. The *Viramitrodaya* has been cited in innumerable decisions of courts in India wherever the *Mitakshara* prevails.

A classical treatise.

The Privy Council has observed:

> It supplements many gaps and omissions in the earlier commentaries and illustrates and elucidates with logical preciseness the meaning of doubtful prescriptions.[198]

This authoritative work of the *Mitakshara* School is a classic because of its direct approach to some of the most involved and difficult questions. Mitramishra is the last of the outstanding commentators who give reliable and authoritative guidance on Hindu law.

Apararka.

The Apararka—Yajnavalkya—Dharmashastra—Nibandha although it purports to be a commentary on *Yajnavalkyasmriti* is more of the nature of a digest than a commentary.[199] In this digest, we find extracts from a number of *Smritikars* whose works are not available to us in their integral form.

Apararka, a Silhara king, flourished about a century later than *Vijnaneshwara* and reference to his massive treatise are to be found in the works of many later writers and in some decisions of courts.[200] Apararka's work is received as of great authority in Kashmir. Its authority is also acknowledged by the expositors of the Benares School. *Apararka* is rather sprawling though not untidy. The usefulness and importance of his work cannot, however, be minimised and may be gauged from the circumstance that Vishweshwara Bhatta, the author of the *Madanaparijata* and *Subodhini*, which is the leading commentary on the *Mitakshara*, has used Apararka's work.

Vaijayanti.

The *Vaijayanti*, written by Nandapandita, an esteemed writer of the Benares school, is as already mentioned, a commentary on the *Vishnusutra*. Nandapandita is the author of the *Dattaka Mimansa* which is a standard treatise and a noted work on the law of adoption.[201] The *Vaijayanti* has been cited with approval in numerous decisions of courts in India and also by the Privy

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198 *Vedachela v Subramania*, (1921) 48 IA 349, p 362.

199 For a translation of a part of the work entitled *Partition of Heritage*; Ghosh, *Principles of Hindu Law*, Volume II.

200 *Buddha Singh v Laltu Singh*, (1912) 34 All 663, p 673, (1915) 37 All 604, pp 617–618 (PC) ; *Chinnasami Pillai v Kunju Pillai*, (1912) 35 Mad 147, p 159 .

201 See § 13.

Council.[202] It is also known as *Kesava Vaijayanti*. Dr Jolly has given many passages from the same in his publication of the *Dharmasutra* of Vishnu.[203]

Benares School.

The Benares School as already mentioned prevails in the whole of North India with the exception of the Punjab and the Viramitrodaya, to which reference has already been made above,[204] ranks there as especial authority. Of the other authorities to which great weight is attached, reference must be made to the *Nirnayasindhu* and the *Vivadatandava* of Kamalakara. Kamalakara is a versatile and an eminent writer of the seventeenth century two of whose numerous works have acquired great authority. His *Nirnayasindhu*, which is the best known of his works though not a work on civil law, is accepted as of authoritative guidance in a number of decisions of various High Courts on questions involving ceremonies and on matters affecting devolution of property and heirship.[205] His *Vivadatandava* is a treatise on the law of inheritance. In most emphatic words he deprecated the assertion of inheritance and heritable rights of women other than those expressly enumerated by certain earlier lawgivers.[206] Kamalakara, comparatively, a modern author, is of the same time as Nikanta Bhatta (who is said to be his cousin), one of the great Hindu jurisprudentes[207] and Mitramishra, the author of the *Viramitrodaya*. Both his works, *Nirnayasindhu* and *Vivadatandava* are entitled to weight wherever the *Mitakshara* prevail; but they are accepted as of particularly great authority in the Benares School when not in conflict with any higher authority.[208] The Benares School is sometimes called the most orthodox of the different schools of Hindu law.[209]

Viramitrodaya.

Nirnayasindhu of Kamalakara.

Vivadatandava.

Mithila School.

The Mithila School has at times followed almost implicitly the *Vivada Chintamani* and the *Vivada Ratnakara*.[210] Though the

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202 *Buddha Singh v Laltu Singh*, (1915) 37 All 604, p 608 (PC) ; but see *Puttu Lal v Parbati Kunwar*, (1915) 42 IA 155 ; *Pitra Kueri v Ujagir Raj*, AIR 1958 All 101 .

203 This commentary was composed by Nandapandita in the first quarter of the seventeenth century at the instance of his patron King Kesavanayaka.

204 See *Viramitrodaya*, Introduction to the book.

205 *Khushalchand v Bai Mani*, (1887) 11 Bom 247, p 254 (marriage ceremonies), *Viswasundara Rao v Somasundara Rao*, (1920) 43 Mad 876, p 882 (*upanayana* ceremony); *Dwarka Nath v Sarat Chandra*, (1912) 39 Cal 319, pp 331–333 (succession to *Stridhana*); *Dattatraya v Gangabai*, (1922) 46 Bom 541, pp 556, 557 (right to perform *Shraddha*).

206 *Ananda Bibee v Nownit La*, (1883) 9 Cal 316, p 324.

207 See Hindu Jurisprudents in Introduction to the book.

208 *Dwarka Nath v Sarat Chandra*, (1912) 39 Cal 319, pp 335, 336. 'The governing authority of the Benares School is the *Mitakshara*'—*Ram Singh v Ugur Singh*, (1870) 13 MIA 373, p 390. Of the commentaries on the *Mitakshara*, the *Vaijayanti* of Nanda Pandita is greatly respected in the Benares school.

209 *Ram Singh v Ugur Singh*, (1870) 13 MIA 373, p 390.

210 *Bhugwandeen v Myna Baee*, (1867) 11 MIA 487, pp 507–508 ; *Birajun Koer v Luchmi Narayan*, (1884) 10 Cal 392, p 399 ; *Balwant Singh v Rani Kishori*, (1898) 20 All 267, p 290 .

Vivada Chintamani,[211] the *Vivada Ratnakara* and the *Madana Parijata* are the favoured Mithila authorities, it is of importance to notice that the law of the Mithila School is the law of the *Mitakshara* except in a few matters in respect of which the law of the Mithila school has departed from the law of the *Mitakshara*.[212] Neither incidental *dicta* in any of those works nor any solitary interpretation or statements in them founded on any ambiguous texts from the *Smritis* can control the plain meaning of any rules laid down in the *Mitakshara*.[213] Of these *Mithila* authorities the *Vivada Chintamani* is given the first place[214] being a work of unquestioned merit written by *Vachaspatimisra* a celebrated *nibandhakar* of the fifteenth century. *Vachaspatimisra* is also the author of *Vivida Chintamani*, another work of allowed excellence. These two works of his are not commentaries on any code but digests and are most probably parts of one and the same treatise. Weight is also attached in Mithila to *Vivadachandra* by Lakshmi Devi, the *Smritisara* by Shrikaracharya, the *Smritisara* by Harinathopadhayaya and the *Dwoita-parishishta* by Keshava Mishra.[215] The *Kalpataru* by Lakshmidhara is a work which is freely cited by the exponents of the Mithila School.

Vivada Chintamani of Vachaspatimisra.

Vyavahara Chintamani.

The *Vivada Ratnakara* mentioned above is a digest which has been referred to in numerous decisions. Its author was Chandeshwara, a minister of Harasinha, who was a Mithila king.[216] Vachaspatimisra has stated that he had considered the *Ratnakara* and it would seem that this work was written in the first quarter of the fourteenth century. Chandeshwara has given the year in which he had performed *Tula Purusha* in which he distributed his own weight of gold amongst *Brahmins*.

Vivada Ratnakara.

The *Madana Parijata* to which reference is made above is a work on civil and religious duties, by Vishweshwara Bhatta. It contains a chapter on inheritance and is treated as an authority in the Mithila School.[217] It is a digest, which quotes a number of works and was written shortly before the 14th century. It was composed at the instance of Madanapala, a king of the Jath race,

Madana Parijata and Subodhini of Vishweshwara Bhatta.

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211 The *Vivadachintamani* has been translated by Setlur in his *Collection of Hindu Law Books*. Mahamahopadhyaya Sir Ganganath Jha, a distinguished jurist, who has among various works to his credit, translated this treatise. In the translation by Tagore there are inaccuracies as noticed in several decided cases: *Rajrani v Gomati*, (1928) 7 Pat 820 ; *Sabitri v Savi*, (1933) ILR 12 Pat 359, p 413 ; *ibid* of that decision, AIR 1933 Pat 306, p 342.

212 *Bhairab v Birendra*, (1949) ILR 28 Pat 123, p 127 ; *Sourendra Mohan v Hari Prasad*, (1926) 5 Pat 135, p 155 (PC) ; *Kamla Prasad v Murli*, (1949) ILR 28 Pat 123, p 127 .

213 *Ram Khelawan v Lakshmi*, (1949) ILR 28 Pat 1008 ; *Bhairab v Birendra*, (1949) ILR 28 Pat 123, p 127 ; *Bacha Jha v Jugmon Jha*, (1885) ILR 12 Cal 348; *Kamla Prasad v Murili*, (1949) ILR 28 Pat 123, p 127.

214 *Thakoor Deyhee v Baluk Ram*, (1886) 11 MIA 139, pp 174-175.

215 *Kamani Devi v Sir Kameshwar Singh*, (1946) ILR 25 Pat 58, p 63 : AIR 1946 SC 316 .

216 This work has been translated by Mr Golapchandra Sarkar Shastri and Digambar Chatterjee J. Of the other translations, reference is often made to the one given by Ghosh in his *Hindu Law*, Volume II.

217 This work has been translated by Ghosh, *Hindu Law*, Volume II and Setlur. The earliest translation was made by S Sitarama Sastri and appeared in the Madras Law Journal. It was published in book form in 1899. A translation by the same author of *Vivada Ratnakara*, originally published in the *Madras Law Journal*, appeared in book form in 1898.

who ruled Kashtha on the banks of the Jamuna. This work has been referred to by a number of later commentators and in numerous decisions. It is written in language comparatively easy to understand. The tenacity of its style is one of its important features. Vishweshwara Bhatta is also the author of *Subodhini*,[218] which is 'the most celebrated commentary on the *Mitakshara*'.[219] It is not a running and exhaustive commentary, but gives a very useful exposition of the difficult and obscure texts in the *Mitakshara* in a remarkably facile manner. The *Subodhini* has been referred to in a number of decisions of various High Courts.

Subodhini of Vishveshwara Bhatta.

The Maharashtra or Bombay School, also known as the School of Western India, claims in respect of certain matters to be the most liberal of the different schools of Hindu law. In Western India, sometimes mentioned as the Bombay Presidency, the pre-eminence of the *Mitakshara* is generally admitted. The relative position of the *Mitakshara* and the *Vyavahara Mayukha*, which are proximate authorities as well as of the other works accepted as authorities in the old Bombay Presidency and in other parts of Western India is discussed in several cases decided by the Bombay High Court. Such works as the *Samskara Kaustubha*,[220] and the *Subodhini*[221] are consulted and reference is made to the *Viramitrodaya*, *Nirnayasindhu* and other works of the *Mitakshara* School.[222] Reference has also been made by that Court to the *Balamabhatti*,[223] and to the interpretations given there to certain expressions in the *Mitakshara*. In the last mentioned work, it is stated that it was written by the lady named Lakshmidevi and at one time, considerable importance was attached to the opinions of this author by the High Court of Bombay, till it was felt that some of those opinions were rather of the nature of what in case of judicial decisions would amount to not more than mere obiters. On certain points the author has expressed very liberal views and given interpretations in furtherance of the rights of women and done so with cute reasoning and in an impressive style. Those interpretations, though welcome in themselves, do not derive support from any authoritative texts or opinions of other commentators and must be regarded as a beautiful, but ineffective flutter of wings. Valuable as is the commentary of

Maharashtra or Bombay School.

The proximate authorities.

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218 The complete text and English translation of the *Vyavaharadhyaya* from this work have been published by Gharpure in his *Hindu Law Texts Series*, Volumes III and IV.

219 *Lallubhai v Mankuvarbai*, (1876) ILR 2 Bom 388, p 416 (FB).

220 *Bhagirathibai v Kahnujirao*, (1887) 11 Bom 285, p 293 (FB) ; *Collector of Madura v Moottoo Ramalinga*, (1868) 12 MIA 397, p 436. An edition of this work was published in 1914 in the *Gaikwad Sanskrit Series*.

221 The complete text and English translation of the *Vyavaharadhyaya* from this work have been published by Gharpure in his *Hindu Law Texts Series*, Volumes III and IV

222 For instance, see *Gojabai v Shahajirao*, (1893) ILR 17 Bom 114.

223 The text of Balamabhatti dealing with *achara*, *vyavahara* and *Prayaschita* were published in separate volumes by Mr Gharpure.

Balambhatti,[224] now generally regarded to have been written by the husband or son of Lakshmidevi, it is not treated in later decisions in Bombay as an authority to be accepted without question.[225]

Vyavahara Mayukha and the Bombay School.

While the parental authority of the *Mitakshara* is never questioned, some of the rules there stated have not been accepted and preference has been given to those put forward in the *Vyavahara Mayukha* in certain parts of Western India. The *Mitakshara* ranks first and paramount in the Maharashtra, Northern Kanara and the Ratnagiri District. However, in Gujarat, the Island of Bombay and the North Konkan, the *Mayukha* is considered as the overruling authority where there is a difference of opinion between it and the *Mitakshara*.[226] The principle, however, adopted by the High Court of Bombay, and sanctioned by the Privy Council, is to construe the two works so as to harmonise them with each other wherever and so far as that is reasonably possible.[227] In Poona, Ahmednagar and Khandesh, the *Mayukha* is considered to be of equal authority with the *Mitakshara*, but not capable of overruling it as in Gujarat, the Island of Bombay and the North Konkan.[228]

Vyavahara Mayukha of Nilkanta Bhatta.

The *Vyavahara Mayukha* of Nilkanta Bhatta, written in the beginning of the seventeenth century is, as indicated above, an authority that strikes a dominating note in some parts of Western India. From the special and almost paramount authority which the *Vyavahara Mayukha* gained in Gujarat and in the island and city of Bombay, it must not be supposed that the *Vyavahara Mayukha* presents a development of the Hindu law connected in any peculiar way with the religious or social system of Gujarat. Before the Maratha conquest of Gujarat, it had long been under Mohammedan rule. The customary law had almost dwindled away into mere caste usages and the Brahminical influence had almost perished. The *Vyavahara Mayukha* was one of the latest products of the Bombay School, and had gained the eminent position which it has retained in the Deccan. The *Brahmins*, following the Maratha chiefs into the newly conquered country, naturally took their law books with them. And of these, the *Vyavahara Mayukha* was the most comprehensive and characteristic. In Gujarat, it had virtually no rival; and, as a Hindu policy was revived there, it took a place

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224 *Buddha Singh v Laltu Singh*, (1915) ILR 37 All 604, p 613 (PC) ; *Pitra Kueri v Ujagir Rai*, AIR 1958 All 101, p 103, for some of the cases where its authority was not accepted.

225 *Bhagwan v Warubai*, (1908) ILR 32 Bom 300 ; *Dattatraya v Gangabai*, (1922) 46 Bom 541, 558 , 'cannot be acepted without due caution and examination'. Reference may also be made to *Pitra Kueri v Ujagir Rai*, AIR 1958 All 101 .

226 *Krishnaji v Pandurange*, (1875) 12 Bom HC 65 ; *Lallubbai v Mankwarbai*, (1878) ILR 2 Bom 388, p 418 ; *Sakharam v Sitabai*, (1879) ILR 3 Bom 353, p 365 ; *Balkrishna v Laksman*, (1890) 14 Bom 605 ; *Jankibai v Sundra*, (1890) 14 Bom 612 (Mahad is not within Northern Konkan); *Narhar v Bhau*, (1916) 40 Bom 621, 36 IC 539 : AIR 1916 Bom 206 .

227 *Ibid.*

228 *Krishnaji v Pandurange*, (1875) 12 Bom HC 65 ; *Lallubbai v Mankwarbai*, (1878) ILR 2 Bom 388, p 418 ; *Sakharam v Sitabai*, (1879) ILR 3 Bom 353, p 365 ; *Balkrishna v Laksman*, (1890) 14 Bom 605 ; *Jankibai v Sundra*, (1890) 14 Bom 612 (Mahad is not within Northern Konkan); *Narhar v Bhau*, (1916) 40 Bom 621, 36 IC 539 : AIR 1916 Bom 206 .

analogous to that of the Roman law in mediaeval Europe,[229] with the Maharashtrian *Brahmins* as its expositors. Hence arose the somewhat strange consequence, that the doctrines of the *Mayukha* gained a more undivided sway over Gujarat than amongst the Marathas themselves, who had men of wide learning and copious sources of information at hand.[230] Predominance was given by the High Court of Bombay and particularly by the older British courts established in Bombay to the *Mayukha* partly perhaps because they found it more frequently quoted to them than the *Mitakshara*, partly because the *Mayukha* was very much praised and followed in Gujarat and partly because the *Mayukha* was the more modern treatise and embodied to a considerable extent such variations in usage as had occurred during the long period which intervened between its composition and that of the *Mitakshara*.[231] Both in Gujarat and in Maharashtra, the doctrines of the *Vyavahara Mayukha* and the *Mitakshara* are largely tempered by customs amongst the backward castes as may be seen from the collections of Steele and Borradaile to which reference is made in a number of decisions. In form the *Vyavahara Mayukha* is a digest and follows the usual pattern of discussion of the eighteen titles of law. This treatise on *Vyavahara* is really one of the twelve parts of his encyclopedic work entitled *Bhagvanta Bhaskara* each part called a *Mayukha* (ray of the sun). The dissertations wholly justify the claim made by the author that he was firmly grounded in the *Smritis* and had no equal in the mastery of the *Purva Mimansa* of Jainmini (*Jaiminiye advitiyah*). He is more than a scholiast or glossator and is accepted as the founder of a liberal school of law. In his discussions we see the work of one of the greatest of the Hindu jurisprudents. His technique is valuable because he gives precision to words. In examining points where the law derives from usage or usage draws inspiration from law, he effectually brings out the important point that the law is more exact in the choice of words whether it be the source or the recipient of the ideas involved.

Nilakantha Bhatta : One of the great juristheologians.

Nilakantha Bhatta was a Maharashtrian Brahmin born in Benares. In general, he follows the *Mitakshara* but there are number of matters on which he differs from Vijnaneshwara. In matters of succession and *stridhana*, the Bombay School is more liberal in giving recognition to the rights of women and for this credit must in a large measure go to this great legist whose work is notable for his originality and open-minded views. Nilkanta Bhatta does not merely present traditional solutions in the traditional way but seems to suggest that he evaluates them in the light of what must

Founder of the liberal School of Western India.

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229 *Sav Geschichte des RR*, Chapter XXVI.

230 *Bhagirthibai v Kahnujirav*, (1887) 11 Bom 285, pp 294-95 (FB) ; *Ambabai v Keshav*, (1941) 43 Bom LR 114, 117-19 .

231 *Lallubhai v Mankuvarbai*, (1876) ILR 2 Bom 388, p 418 (FB).

have been the then current thought and current needs of the society. A translation of *Vyavahara Mayukha* was published by Mr Mandlik in 1880. Thereafter Mr Gharpure and M Kane have also published their translations.[232] An interesting account of the life of Nilkanta Bhatta, his works and his family which produced some very learned authors, is given by M Kane in the introduction to his publication of *Vyavahara Mayukha*.

Dravida or Madras School.

The Dravida or Madras School, also known as the School of Southern India, leans heavily on the *Smriti Chandrika*, which is intended to supplement and not replace or abrogate the *Mitakshara*. The *Smriti Chandrika* of Devanna Bhatta,[233] who flourished in the close of the twelfth century has all along had a commanding influence in South India. It is an exposition on the law of inheritance and was considered by Colebrooke to be a work of uncommon excellence, equal, if not superior, to *Parashara Madhaviya* which also is a leading authority in the South.[234] Little, if anything is known of Devanna Bhatta but there is adequate data that the work was compiled sometime in the beginning of the great Vijaynagar Empire. Devanna Bhatta cites copiously from Katyayana and Brihaspati which shows the great eminence and authoritative status which had been achieved by the authors of those leading *Smritis*. However, for the *Smriti Chandrika*, some texts of Brihaspati and a number of texts of Katyayana would have probably been lost to us. The work also refers to a commentator spoken of as Sangrahakara to whom was attributed the authorship of an abridged edition of Manu's Institutes. The *Smriti Chandrika* is not a commentary but a *Nibandha* (digest) and a work of especial authority of the Dravida or Madras School, in which it has originated. However, it is to be noted that it is accepted there in point of authority as next to the *Mitakshara*.[235] Therefore, in the absence of any evidence of usage, indicating consciousness of the people governed by that school that any opinion expressed in the *Smriti Chandrika* is living law, the court would not be justified in departing from any doctrine of the *Mitakshara*,[236] and prefer any text of the *Smriti Chandrika*. In *Buddha Singh v Laltu Singh* the Judicial Committee of the Privy Council observed that the author

Smriti Chandrika of Devanna Bhatta.

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232 M Kane's translation has been relied upon by the courts in a number of cases. It is very useful, both from the scholastic and the practical legal point of view, as the meaning of some abstruse texts has been brought out after referring to the technical *Mimansa* rules.

233 The first English translation of the law of succession and inheritance from this treatise was published by T Krishnaswamy Ayyar in 1867. Other translations of the same are to be found in the publications of Ghosh, *Hindu Law*, Volume II and Setlur. The work has been published in the *Hindu Law Texts Series* of Gharpure.

234 See Hindu Jurisprudents, Introduction to the book.

235 Reference may be made to *Kamalammal v Venkatalakshmi*, AIR 1965 SC 1349, 1356 where the importance of this work was emphasisted, *Sundaram Pillai v Ramasamia Pillai*, (1920) 43 Mad 32, p 34 ; *Raju v Ammani*, (1906) ILR 29 Mad 358 .

236 *Simmani Ammal v Muttamma*, (1880) ILR 3 Mad 265, p 269 .

of the *Smriti Chandrika* 'differs from the author of the *Mitakshara* in several essential rules of law. It seems, to say the least, doubtful whether any enunciation in the *Smriti Chandrika* can be safely applied, except perhaps by way of analogy, to explain a dubious or interminate phrase or term in the *Mitakshara*'.[237] It is true that on some points Devanna Bhatta differs from the *Mitakshara* and there is occasionally about him the mere *ipse dixit* of the law-giver. Most probably those interpretations and opinions were tinged by established usages or views, which found general favour in the South and this accounted for the very high authority there wielded by this work. Though not held in equal estimation by the other schools, it must be noted that the *Smriti Chandrika* is a treatise most freely quoted as a high authority in the works of almost all writers who flourished after the twelfth century and is approached by all the high courts as a valuable source of Hindu law. There are in the *Smriti Chandrika* very full and detailed discussions on a number of questions often running to several pages. Devanna Bhatta seems to be of the view that mere exposition of a word or phrase would often be barren and unsatisfactory and on that account takes particular care to see that his treatment of the important texts of the *Smritikars* is exceptionally complete. However, his notations are selective and his propositions are stated in a straightforward manner with a logical sequence. His style is impeccable.

A very valuable source of law.

Parashara Madhaviya.

Among the other works which are regarded as authoritative in the South are the *Parashara Madhaviya*, to which reference has already been made,[238] the *Sarasvati Vilasa*, the *Nirayasindhu* and the *Subodhini*.[239] The *Sarasvati Vilasa*,[240] ranks high in this school. It has been referred to in a number of decisions of the Privy Council. Undoubtedly, as pointed out by the Supreme Court, the foremost is the *Mitakshara*. That is followed by the *Smriti Chandrika* and next by *Sarasvati Vilasa*. Where there is no text of the *Mitakshara*, which directly contradicts the law as expounded in the *Sarasvati Vilasa* it cannot be discarded on the ground of any alleged defects in its reasoning.[241] Prataprudadeva, a king of a principality near modern Cuttack who is the reputed author of this work, flourished some centuries after Devanna Bhatta, the author of the *Smriti Chandrika*, to which later work frequent references are made in his work. The *Sarasvati Vilasa* presents a picture of the actual working of the law and not merely a series of abstract statements of old rules. It has been referred to in

Sarasvati Vilasa.

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237 *Buddha Singh v Lattu Singh*, (1915) ILR 37 All 604, p 619 (PC).
238 *Chinnasami Pillai v Kunju Pillai*, (1912) 35 Mad 153, p 156.
239 See authorities in Hindu Law, Introduction to the book.
240 A translation of this work was published by the Rev Thomas Foulkes. Other translations of it are to be found in the publications of Ghosh, Volume II, and Setlur.
241 *Kamalammal v Venkatalakshmi*, AIR 1965 SC 1349, pp 1356, 1357.

decisions of various courts.[242] However, it is not regarded as a work of any particular authority in certain districts of Travancore-Cochin.[243] Of commentaries which rank high in the Madras School, mention must also be made of the *Vyavahara Nirnaya* of Varadaraja and *Smritimuktaphala* which have been referred to in a number of decisions.[244]

Vyavahara Nirnaya.

It has been repeatedly pointed out in decisions of the Madras High Court that none of these and other authorities respected by the Madras School can outweigh the *Mitakshara*.

Bengal or *Dayabhaga* School.

The Bengal or *Dayabhaga* School as it is generally denominated, prevails in the Bengali speaking States of Bengal and Assam and the *Dayabhaga*, the celebrated treatise of Jimutavahana, is most respected and is of ascendant authority in those states. The *Dayabhaga* is a valuable dissertation on the law of inheritance and partition and is believed to be a part of a larger work known as *Dharmaratna*. The other works of Jimutavahana entitled *Kalaviveka* and *Vyavaharmatrika* were also part of this larger work. Whether the larger work was wholly written or intended to be written has remained a matter of uncertainty. The *Dayabhaga* is not a commentary on any particular Code but purports to be a digest of all the Codes.

Jimutavahana, author of Dayabhaga.

Jimutavahana, the founder of the Bengal School, flourished in or about the beginning of the twelfth century. His doctrines on the law of inheritance and the joint family system controverted some basic rules stated in the *Mitakshara* of Vijnaneshwara.[245] It is difficult to say as to when the protestant and advanced views of Jimutavahana were accepted as of binding authority in Bengal, but it seems that this treatise soon commanded recognition and acceptance as the fountain-head for a number of commentators on the same, the earliest of whom probably was Srinath Acharya Chudamani.[246] Not much is known about Jimutavahana but there is reliable material, which goes to show that this eminent jurist-consult was a judge and a minister of the king of Bengal. His massive character must have run along lines and appears to have found its full and direct expression in his work.

Progressive juris-consult: Builder of a great school.

Jimutavahana, although he does not break away from or gloss over any authoritative texts of the leading *Smritikars*, as will be seen from a comparison of the points of difference in the law of inheritance between the *Mitakshara* and the *Dayabhaga*, does break in upon the *Mitakshara* system which favours a particular

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242 *Muthappundayan v Ammani Ammal*, (1898) 21 Mad 58, p 60.

243 *Neelmma v Peruma*, AIR 1953 Tr & Coch 518, p 521 (FB); *Krishna Kumar v Sheo Prasad*, AIR 1947 Nag 205, p 207.

244 *Simmani Ammal v Muttamma*, (1880) ILR 3 Mad 265, 267, 269; *Buddha Singh v Laltu Singh*, (1915) ILR 37 All 604, p 618 (PC) . The *Smritimuktaphala* of Vaidyanatha Dikshitar has been published by Mr Gharpure. The *Vyavaharakanda*, however, remains to be published.

245 See Bengal School, Introduction to the book.

246 See the Introduction to the book.

mode of devolution of joint family property in case of death of a coparcener. He introduces innovations in a number of incidents of the joint family and the rights of the members of such family. He purports to found himself on certain precepts of Manu, the meaning of which according to him had not been properly comprehended by some previous commentators. He is not averse to, and in fact, is successful in the creation of adroit devices and the use of fictions based on legal subtitles to relieve the pressure of traditional law. This he does by expressing his disagreement with other commentators. Although he does not expressly mention the name of the commentator with whom he really joins issue and is in particular disagreement, it is obvious that he is controverting some of the doctrines of Vijnaneshwara. He does not accept any set of propositions laid down by the other commentators on questions of inheritance as crystallised law and deals with his subject as an objective science. His appeal is more to reason and stern logic than to precepts or precedents and his approach to some of the controversial questions raised by him is forthright and direct. He plunges in *medias res* and is at the heart of the subject. Much can be learnt from this builder of a great edifice whose radical turn of mind made him hunt back constantly to dig up a variety of standpoints and examine their roots. The criticism made by Mitramishra and others that Jimutavahana relies at times merely on postulations does not appear to do justice to this progressive juris-consult, some of whose interpretations were in all probability tinged by established usages and must naturally have found favour with the Hindus of Bengal.

Dayatatva of Raghunandana.

Of other authorities of the Bengal School, formerly at times mentioned as the Gauriya School, the most notable is the *Dayatatva* written by Raghunandana Siromani of Nadia. It is a treatise on the law of inheritance and is generally accepted as giving the most reliable exposition of the doctrines of the *Dayabhaga* and has become almost a textbook on law.[247] The authority of Raghunandana is acknowledged and respected universally in the Bengal School as only next to that of Jimutavahana and statements from his work, some of which have become *locus classicus*, are cited and relied upon in numerous decisions of the Calcutta High Court.[248] Srinath Acharya Chudamani and Srikrishna Tarkalankar are other exponents of the *Dayabhaga* law. The latter is the author of Dayakarma Sangraha, which is an excellent compendium of the law of inheritance. His elucidations have been of great assistance and guidance to the court in a number of cases. Achyuta and Maheshwara followed Srinath. All of them are expounders of stature of dignity and wide prestige. The *Vivada Bhangarnava* of Jagannatha Tarkapanchanana, a work commonly known as *Colebrooke's Digest*, is one of the authorities

Srikrishna Tarkalankar and other authors of Bengal School.

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247 The *Dayatatva* was translated by Golapchandra Sarkar Sastri.

248 For instance, *Hiralal v Tripura Charan*, (1913) ILR 40 Cal 650, pp 668, 669 (FB).

consulted in Bengal. With the exception of the three leading writers of the Bengal School, namely Jimutavahana, Raghunandana and Srikrishan Tarkalankar, the authority of Jagannatha is, so far as that school is concerned, higher than that of any other writer.[249] Mention may also be made of the *Dipakalika* of Shulapani[250] which is one of the older authorities accepted in Bengal. It is a commentary on the *Yajnavalkyasmriti*. It has the merit of brevity and is remarkable for its neatness of style. Where the authorities of the Bengal School are silent or where there is no conflict between them and the leading authorities of the *Mitakshara* School, reference may be made to the latter in cases in Bengal.[251]

Special works on adoption.

Reference must be made in passing to two special works on adoption—the *Dattaka Mimamsa* and the *Dattaka Chandrika*. Generally speaking, they are equally respected throughout India, but where they differ, the *Dattaka Mimansa* is preferred in Mithila and Benares, and the *Dattaka Chandrika* in Bengal. Both works have had a high place in the estimation of the courts in all parts of India, and having had the advantage of being translated into English at a comparative early period, their authority was increased during the British rule. The law of adoption built up in decisions of the Privy Council has been usually founded on these two treatises which furnished almost exclusively the basis for the same.[252]

Marumakkattayam, Aliyasantana and Nambudiri Systems of Law Prevalent in South India.

Apart from the two principal schools mentioned above, reference must also be made to certain systems prevailing among a considerable section of the people inhabiting the West Coast of South India. These systems embodied a body of customs and usages which had received judicial recognition. There was also legislation relating to the same. The three systems mentioned in the marginal note presented some interesting and common features although they differed form one another in certain respects. One essential difference between *Marumakkattayam* and the other schools of Hindu law is that it is founded on the Matriarchate family and descent is from a common ancestor,[253] whereas under the *Mitakshara* and *Dayabhaga* descent is from a common ancestor. So the *lex scripta* of the *Smritis*, though in theory it continued to remain the infallible guide and one of the effective sources of law, gave way on most points to the authority of the commentators whose interpretations were received as authentic by the particular school. This evolution of Hindu law was at times apt to be overlooked by the courts owing to the fact that the *Smritis* were

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249 *Kery Kolitany v Moneeram*, (1874) 13 Bengal LR 1, pp 49–51.

250 A translation of the portion on partition is to be found in the publication of Ghosh, *Hindu Law*, Volume II.

251 *Moniram v Keri Kolitani*, (1880) ILR 5 Cal 776, pp 778, 789 (PC) ; *Collector of Madura v Moottoo Ramalinga*, (1868) 12 MIA 397, p 435 (PC) .

252 The leading decisions on the subject were referred to by the Privy Council in *Arumilli Perrazu v Subbarayudu*, (1921) ILR 44 Mad 656 , pp 665–68; §13.

253 Reference may be made to sections 7 and 17 of The Hindu Succession Act, 1956 and to the notes thereunder.

the axis of the law and the desire to turn immediately to the same was quite natural. Nearly a century ago the Judicial Committee of the Privy Council observed[254] that the early versions of the laws of Manu were very ancient and it might be doing great mischief to construe the words of the original texts literally, unaided by the gloss that had been put upon them by writers and commentators of authority. A number of the precepts of Manu have been undoubtedly altered and modified by modern law and usage. The duty, therefore, of the court is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which it has to deal, and has there been sanctioned by usage.[255] The tenacity with which people in different parts of the country clung to their age-long traditions and family and local usages are often reflected in the works of the commentators. Though the commentators professed to interpret the law laid down in the *Smritis*, their conclusions were in a large measure permeated by the customs and usages, which they found in vogue around them. In the case of *The Collector of Madura v Moottoo Ramalinga* referred to immediately above, the Privy Council ruled that it is the duty of the courts to recognise the rules of the law enunciated in the commentaries, even if they appear to proceed on a wrong interpretation of the *Smritis*, 'the reason being that under the Hindu system of law, clear proof of usage will outweigh the written text of the law'. Indeed, the *Mitakshara*, the *Dayabhaga* and the other works of especial authority subordinate in so many places the language of the *Smriti* texts to custom and approved usage and evolve rules which draw inspiration from custom. The leading commentators and *nibandhakars* although they purported to confine their task within the structure of the *Smriti* law accomplished the work of keeping the law abreast of the felt necessities and demands of the time through a long series of centuries during the post-*Smriti* period commencing from about the beginning of the seventh century when Asahaya wrote his *Naradabhashya* and ending with the seventeenth century when Viramitrodaya, the last of the leading commentaries, was written by *Mitramishra*. They originated and accomplished their task without permitting themselves to be fettered with orthodox prejudices and yet with disciplined sagacity. They combined intimate knowledge and mastery of the law and their awareness of its conservatism with gravities and a liberal readiness to move with the times. Even when they were expounding a particular Smriti, they constantly kept before their mind a map of the *Smriti* law as a whole. They have been adverted to in some decisions as mere glossators, or compilers of congeries of

Practical Importance of the Commentaries.

Commentators were virtually lawmakers.

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254 *Pedda Ramappa v Bengari Seshamma*, (1880) 8 IA 1 ; *Ramalaxmi v Svanantho*, (1872) 14 MIA 570.
255 *Collector of Madura v Mootto Ramalinga, (*1868) 12 MIA 397; *Atmaram v Bajirao*, (1935) 62 IA 139.

customs. It must have been seen from the foregoing observations that the leading commentators and *nibandhakars* were more than glossators or compilers of customs. At times they have been referred to not inappropriately as scholiasts obviously in analogy of the commentators of the Greek and Latin classics and the European philosophers of the middle age whose great aim was to reduce the doctrine of the Christian Church to a scientific system. During a long series of centuries when legislation in the modern sense had not originated and judicial precedents as now understood had no established authority, these juris-theologians were virtually lawmakers who systematised the personal law of the Hindus and accomplished legal innovations and in doing so combined all that legal philosophy could yield and substantially enriched Hindu law and jurisprudence.

Custom a source and constituent part of law.

Pursuing the order in which the indices of law are stated by the Hindu jurisprudents, reference must next be made to approved usage or custom. Ancient custom is generally regarded as a just foundation of many laws in every system of jurisprudence and for reasons grounded on principle and justice.

Cicero, speaking of the generation of custom observes in a classical passage:

> *Justitiae initium est a natura perfectum. Diende quaedam in consuetudinem ex utilitatis ratione venerunt. Postea res, et a natura profectas, et a consuetudine probatas, legum metus et religio sanxit.*
>
> 'Justice has emanated from nature. Therefore, certain matters have passed into custom by reason of their utility. Finally, the fear of law, even religion, gives sanction to those rules which have both emanated from nature and have been approved by custom'.

In Hindu law, immemorial custom has *proprio vigore* the efficacy of law. It is not merely an adjunct of ordinary law, but as has already been pointed out, a constituent part of it.

Its importance stressed by the Smritikars.

During the earliest stages of the development of Hindu law, custom was acknowledged and accepted as being the embodiment of principles and rules prescribed by sacred tradition. During the *Sutra* period also, the influence of custom upon law bore the same characteristic. Gautama, the most ancient of the *Sutrakars* whose aphorisms on law are extant, states at the very outset of his work: 'The Veda is the source of the sacred law, and the tradition and practice of those who know the Veda'.[256] Gautama states in another aphorism relating to administration of justice by the king: 'The customs of countries, castes and families which are not opposed to the sacred records have also authority'.[257] Manu, as has already been pointed out, regards approved

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256 I, 1, 2, *SBE*, Volume II; *Apastamba*, I, 1, 1–2—*Athatah samayacharikan dharman vyakhyasyamah: dharmagnasamayah pramanam vedashcha.*

257 XI, 20 *SBE*, Volume II.

usage as direct evidence of law.[258] He stresses the importance of custom.

Sadachara.

The expressions generally used by the Smritikars for 'custom' are *achara, sadachara* and *shishtachara*. Broadly interpreted they mean practices of good men, a concept which necessarily involves the element of reasonableness. In the context of civil law *sadachara*, which is the most commonly used of these three expressions, requires that there must be no element of mortal turpitude or anything opposed to public policy about the custom. The Mahabharata, in one place, uses the expression *'Lokasangraha'* meaning usages of the people and in another place states that usage is superior to all the *Shastras* taken together. Without retracing covered ground,[259] the importance and efficacy attached to custom by the Hindu juris-theologians may be summarised by reference to the oft-quoted verse of Narada: 'Custom is powerful and overrides the sacred Law'.[260] There are in the *Smritis* numerous texts relating to the origin and binding nature of custom and the commentators and *Nibandhkars* have critically discussed, considered and applied those texts.[261] Of those, the texts of Manu and Narada cited above and a quotative verse of Brihaspati exhorting recognition of local, tribal and family usages[262] are particularly notable.

Custom can outweigh written text of the law.

In a long series of cases decided by the Privy Council and courts in India, the rule has been accepted that custom can override any text of *Smriti* law. In *Collector of Madura v Moottoo Ramalinga*, the Judicial Committee of the Privy Council observed: 'Under the Hindu system of law, clear proof of usage will outweigh the written text of the law'.[263] It has been repeatedly stated that a custom may be in derogation of *Smriti* law and where proved to exist may supersede that law.[264] The tenacity of family customs, even under the strain of migration, has been repeatedly recognised in decisions of the courts.[265] It may, however, be observed that though local and family custom, if proved to exist, will supersede

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258 II, 12.

259 *Manusmriti* states: 'Here the sacred law has been fully stated... and also the traditional practices and usages of the four *varnas*'—I, 107. A popular verse from the *Mahabharata* is: '*Dharma* has its origin in good practices and Vedas are established in *Dharma*'—*Achara sambhavo dharmo dharme vedah pratishthitah—Vana Parva*, 150, Chapter 27. Vasishtha observes: 'Manu has declared that the (peculiar) practices and usages of countries, castes and families may be followed int he absence of rules of revealed texts'—1, 17 (*SBE*, Volume XVI).

260 I, 40. Asahaya states that this verse accepts the rule that custom is superior to written law. The Romans took the view that an existing statute might even be replaced by adverse usage *'ea vers (ie jura) quaoe ipsa sibi quaeque civitas constituit, saepe mutari solent vel tacito consensu populi vel alia postea lege lata'*.

261 Reference has already been made to some of them. Asahaya cites—*Deshe deshe ya acharah paramparyakaramagatah: Sa shastrarthobalannaiva langhaniyah kadachana.*

262 *Desha jati kulanam cha ye Dharmah prak pravartitah: Tathaiva te palaneeyah prajah prakshubhyatenyatha*: II, 28 *SBE*, XXIII.

263 *Collector of Madura v Moottoo Ramalinga*, (1868) 12 MIA 397, p 436.

264 *Neelkisto Deb v Beerchunder, (*1869) 12 MIA 523, p 542.

265 *Parbati v Jagdis, (*1902) 29 IA 82 .

the general law, the general law will in other respects govern the relations of the parties outside that custom.[266] The essential attributes of a custom are that it must be ancient, reasonable; must have continued or been observed without interruption; and must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect. It must be uniform and obligatory. It must not be immoral or opposed to public policy and cannot derogate from any statute unless the statute saves any such custom or generally makes exception in favour of rules of custom. In a catena of cases, the Judicial Committee of the Privy Council has observed that it is of the essence of special usages modifying ordinary law that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the courts can be assured of their existence and that they possess the conditions of antiquity and certainty on which alone their title to recognition depends.[267] A subsidiary or auxiliary indice of *Dharma* was *Nyaya* or *yukti*, which expresses the juridical connotation of which is included, the principles of equity. The *Smriti* texts, howsoever widely interpreted and usages of people though fully recognised, could not obviously provide for every conceivable question of law. Analogies drawn from established rules and fictions of law were therefore resorted to in order to cover such cases. One of the rules laid down by Jaimini in his *Mimansa* was *atidesha* whereby any principle laid down with reference to one case was applied to other analogous cases.[268] It is well understood that the spirit of equity underlies many legal fictions,[269] and rule propounded by analogy. It was recognised by the *Smritikars* that the traditional law, from its very nature, could not be exhaustive and principles of justice had to be invoked in cases not expressly provided for by the *litera legis* or conventional law. Yajnavalkya enjoined that *nyaya*, meaning natural equity and reason, should prevail in case of conflicting rules of law.[270] Brihaspati gave a rule of fundamental importance when he recommended *yukti* in the well-known *versus memorialis* that decision must not be made solely by having recourse to the letter of the written codes; since if no decisions were made according to the reason of the law, or according to immemorial usage, there might be a failure of justice.[271] Narada also, although he does not in this

Essential attributes of custom.

Nyaya or *yukti* : An auxiliary indice of Dharma.

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266 *Kali Pershad v Anund Roy, (*1887) 15 IA 18 ; *Rao Kishore Singh v Gahenabai*, (1920) 22 Bom LR 507 (PC) .

267 *Raja Rup Singh v Rani Baisini, (*1884) 11 IA 149, p 162.

268 Books VII and VIII. *Atidesha* is a relation in which one thing contains the indication of another thing and deriving its force from that other becomes (by derivation) an incident of it: *Yasya lingamartha-sanyogad abhidhanavat* VIII, i 2. Remote analogy, however, was not permissible.

269 *In fictione juris semper aequitas existit.*

270 See *Smritikars*, Introduction to the book.

271 *Kevalam shastramashritya na kartavyo hi nirnayah: yuktiheen vichare tu Dharmahanih prajayate.*

context use the expression '*nyaya*', favours an appeal to *yukti*.[272] Even apart from any special or technical significance of these expressions, it does appear that the unified legal system aimed at by the *Smritikars* did envisage a department or aspect of law which would permit, within limits, interpretation of the sacred texts by resorting to something akin to what the modern lawyer at times does when he appeals to the 'equity of the statute'.[273]

Natural equity.

The expressions *'nyaya'* and *'yukti'* are certainly broad enough to allow the two sorts of equity described by Cowell: 'for the one doth abridge and take from the letter of the law, the other doth enlarge and add thereto'. The *Smritikars* dealt with the perennial conflict between law and justice by emphasising the importance of right reason, good sense and equable justice by which alone any law can justify its existence. Several Charters of the British Parliament directed courts in India to proceed when the law was silent in accordance with justice, equity and good conscience, an expression which was generally interpreted to mean rules of English law if found applicable in Indian society and circumstances.[274]

Principles of Justice, equity and good conscience.

These principles were invoked only in cases for which no specific rules existed.[275] Accordingly it was laid down by the Judicial Committee of the Privy Council in the case of a Will that because the case was new, the court would not take the view that it was not provided for at all. Where new combinations of circumstances arose, it was incumbent on the court to apply rules of law which could be derived from general principal. Nor would the court abandon all analogy to such principles and similar cases but would keep them steadily in view not merely for the determination of the particular cases but for the interests of law as a science.[276] Applying this rule of jurisprudence, the Privy Council held in another case that a murderer was disqualified from succeeding to the property of the murdered person in case of intestacy. This rule of English law founded on public policy was applied to the case of a Hindu on grounds of justice, equity and good conscience.[277] However, care was taken to see that no refined distinctions essentially characteristic of English law and no technical rules of equity were introduced into Hindu law.[278] Though there are no

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272 IV, 40.

273 They recognised that the rigour of the law often required to be moderated and that there was, at times, the possibility of litigants successfully evading operation of rules of law by recourse to subtleties and technicalities. A text of *Yajnavalkya* enjoined the king to do justice according to the pith and substance of the rule of law and disregard technical flaws and deceptive subtleties—*Chhalam nirasya bhootena vyavaharannayennrupath*—II, 19.

274 *Waghela Rajsanji v Sheikh Masludin, (*1887) 14 IA 89 .

275 *Ram Coomar v Chunder Canto, (*1876) 4 IA 23, pp 50-51 .

276 *Juttendromohun Tagore v Ganendromohun Tagore, (*1872) Supp IA 47 ; *Subramania Ayyar v Rathnavelu Chetty, (*1918) 41 Mad 44, p 74 (FB) .

277 *Kenchava v Girimalappa, (*1924) 51 IA 368 , section 25 of The Hindu Succession Act, 1956, now inflicts this disqualification on the murderer.

278 *Juttendromohun Tagore v Ganendromohun Tagore, (*1872) Supp IA 47 .

texts in the *Smritis* expressly recognising the right of an adopted son to inherit to his adoptive mother's relations, this right has been enforced on general principles of equity and good conscience and analogy deducted from texts applicable to similar cases.[279] In *Gurunath v Kamalabai* the Supreme Court observed that it is well known that in the absence of any clear *Shastric* text the courts have authority to decide cases on principles of justice, equity and good conscience unless it is shown that the decision would be repugnant to or inconsistent with any doctrine or theory of Hindu law.[280]

Appeal to the genius of Hindu Law.

Where there is absence of any express rule of law and any authority affording any real guidance and no rule of custom, appeal to the spirit of the law is not unknown. Some modern decisions of the highest tribunal in England go to show that, while judges do not legislate at large, they do subscribe to the view that only in the absence of authority, and when the spirit of the law suggests the affirmation of previously unknown or undetermined duties, the courts do commit themselves to novelty, though of course, very cautiously. Instances do occur from time to time, though they are not frequent, where the courts in examining any new situation or a new jural relationship have regard to the genius of the Hindu law[281] and the consciousness of the community at large and also found the conclusions reached by them on the grounds that they were more in accordance with the reason of the thing and general principles.

Judicial decisions as a source of law.

Since the reduction of India under British rule another element was added to the effective sources of Hindu law. The courts had to ascertain and administer the personal law of the Hindus in matters relating to succession, inheritance, marriage, adoption and religious usages and institutions except in so far as such law was altered by legislative enactment. The decisions of courts, founded on interpretation of the texts of the *Smritis* and principally on the views expressed by the commentators accepted as leading authorities in the different schools, although they immediately affected only the parties, necessarily operated as binding on the entire community. Judicial precedents became necessary and useful, for in them the courts found reasons to guide them and the authority of those who made them had to be regarded. Unfortunately, however, the importance of custom was at times not fully appreciated and decisions given on some points had the effect of disturbing what had been accepted by the community as established law. The *cursus curiae* was bound to be strong in these matters and there was little chance of retracing

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279 *Subramania Ayyar v Rathnavelu Chetty,* (1918) 41 Mad pp 44, 74 (FB).

280 *Gurunath v Kamalabai,* (1951) 1 SCR 1135, pp 1147, 1148; *Peramanayakam v Sivaraman,* AIR 1952 Mad 419, pp 472, 473 (FB). Reference may be made to *Kamalakshy v Narayani,* AIR 1968 Ker 123.

281 *For* instance, *Tiruvengadam v Butchayya,* (1929) ILR 52 Mad 373, p 379.

the steps already taken because obviously the preferable course was to follow the doctrine of *stare decisis* and to uphold a decision already given rather than overturn it after it had stood unreversed and acquired increased strength by lapse of time. This, as will be presently pointed out, tended to impart a measure of rigidity to the law. With numerous superior courts administering law in different parts of the country there grew up a mass of case-law and most of the important points of Hindu law are now to be found in the law reports and to this extent it may be said that the decisions of Hindu law, though not in theory yet in effect, have in part superseded the commentaries and limited and supplemented the rules of Hindu law. Modern jurisprudence endorses the importance of authoritative precedents and accepts them as legal sources of law being entitled to unquestioning obedience. The pronouncements of the Privy Council and now of the Supreme Court are final and in practice recourse to them is of the utmost importance and necessity: The decisions of the Privy Council and the Supreme Court are binding on all the other courts of India including the High Courts; but the decisions of any one High Court are not binding on any other High Court, though they are binding on the courts subordinate to it.

Hindu law not static but empric and progressive and a living system.

It is seen from the foregoing observation that Hindu law was not static or staid but was empiric and progressive. Sir Henry Maine, author of *Ancient Law*, and some of his contemporaries propounded the speculative theory that the *Manusmriti* and other *Smriti* Codes did not at any time constitute a set of rules of positive law actually administered in India. In their opinion, expressed with smug uncharitableness, the *Smriti* law, in great part, was merely the ideal picture of that which in the view of the *Brahmins*, ought to be the law. It was suggested by an eminent English author that Hindu law was 'a mere phantom of the brain imagined by Sanskritists without law and lawyers without Sanskrit'. All this naturally disturbed many Indian jurists and scholars who felt compelled to refute the charge. It is no more necessary to discuss that theory since it has now been securely interred and its perturbed spirit has ceased to vex the law.

Some writers on Hindu law made observations of a like nature with lofty disdain or condescension and some captious critics could see in the *Dharmashastras* only primitive rules of rude simplicity. Dr Sen has observed that the critic who pretended to see nothing in the Hindu law but a stagnant mass of archaic rules knew not what he said and only showed that he himself had a stagnant mind. This eminent jurist has, however, justly pointed out that for this attitude of those writers we ourselves are partly responsible. While foreign jurists, in spite of their many disadvantages have, out of a spirit of research, directed their attention to Hindu law, no matter with what success, we ourselves have simply

looked on.[282] It must also be acknowledged that translations of many *Dharmashastras* by eminent orientalists of Europe in the *Sacred Books of the East Series* and in other publications and the monographs written by them are the result of untiring research and evince critical power of the high degree. Mostly based on leading commentaries, those translations of some of the *Smritis* have been of great help to the courts and generations of lawyers and students of Hindu law.

The slow and steady process of development of Hindu law was the result of innovations, often imperceptible, as happens when old and obsolete rules become gradually displaced by growing usages and customs. In a large measure impetus was given to that progress by the standard works of those leading commentators and *nibandhakars* who did not permit themselves to be fettered by orthodox prejudices and showed liberal readiness to move with the times. However, as the Hindu Law Committee very appropriately observed, we have no longer *Smritikars* and commentators of the old type; we have the Legislature and the courts of law. The courts of law however do not exercise the same freedom of interpretation in moulding the law as did the ancient commentators even when the interpretation was not deducible from the earliest authorities. This practically meant that Hindu law, excepting in so far as the Legislature intervened, had to remain arrested in its growth at the point at which it was left by Vijnaneshvara, Jimutavahana and other recognised commentators, the latest of whom flourished in the eighteenth century.[283] For more than two thousand years after the Code of Manu was compiled, Hindu law pursued the even tenor of its way without any real break in its continuity and was altered, improved and refined from time to time. However, the spontaneous growth of Hindu law was retarded if not wholly stopped with the reduction of India under British rule. The difficulties of English judges, who did not know the language of the *Dharmashastras*, when called upon to administer a system of law which required understanding and appreciation of argumentative works, religious traditions, ancient usage and more modern habits of the Hindus with which they were unfamiliar, were indeed great. No system of law makes the province of legal obligation co-extensive with that of religious or moral obligation. The ancient work and commentaries dealt with and discussed texts which were mandatory as well as those which were directory and did not always draw a clear line of demarcation between matters religious and secular.[284] Texts which did not contain positive law were at times not distinguished from rules intended for positive laws and in a number of cases the Privy Council sounded a note of caution while correcting such errors.

Its growth arrested.

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282 Sen's *Hindu Jurisprudence*, p 110.
283 Report of the Hindu Law Committee, 1941, paras 15–16.
284 See *Dharmashastras*, Introduction to the book.

In difficult cases some of those judges were not unnaturally inclined to rely on their own concepts of what the law should be and in *praesumptiones hominis* and at times reached conclusions at variance with the spirit and substance of Hindu law. In some cases, doctrines of English law of doubtful applicability were pitchforked into Sanskrit texts and Roman law was laid under contribution.

The Privy Council, not being unmindful of all this observed in a very early case:[285]

> At the same time it is quite impossible for us to feel any confidence in our opinion, upon a subject like this, when that opinion is founded upon authorities to which we have access only through translations, and when the doctrines themselves, and the reasons by which they are supported, or impugned, are drawn from the religious traditions, ancient usage's, and more modern habits of the Hindoos, with which we cannot be familiar.

Decisions of the Privy Council.

With their mastery of jurisprudential concepts and their unmatched forensic ability to expound and elucidate even the most complicated matters of unfamiliar laws affecting the personal status of parties, their Lordships of the Privy Council evolved principles and laid down rules on varied and complex subjects in their own unique style and generations of lawyers and judges in this country have acknowledged their indebtedness to that August Tribunal for the lead and guidance given by it. The principle was established that the duty of judge, who is under the obligation to administer Hindu law is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities (*Smritis*), as to ascertain whether it has been received by the particular school which governs the district with which he has to deal and has there been sanctioned by usage. For, under the Hindu system of law, clear proof of usage will outweigh the written text of the law.[286]

Difficulty of establishing custom.

However, 'clear proof of usage' of necessity required establishment of the usage by showing that it was ancient, certain and reasonable and where the attempt was to support any usage in derogation of the general rules of Hindu law, it had to be construed strictly. The lawyer familiar with rules of procedure and evidence knows the practical difficulties in the way of a party who undertakes the heavy burden of adducing satisfactory proof of usage, so long and invariably acted upon in practice, as to show that it has by common consent, been submitted to by a class or a district or local area. The course of practice upon which the custom is said to rest must not be left in doubt but be proved with certainty. Moreover custom in matters of personal law readily applies closure and does not permit of extension by analogy nor of any deductivity by *a priori* methods. Custom should occur

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285 *Bungama v Atchama*, 4 M.LA., 1 (97)
286 *Collector of Madura v Moottoo Ramalinga, (*1868) 12 MIA 397, pp 435–36.

substantially under conditions substantially similar and instances must indicate the probable general habit of persons under similar circumstances. The principles are indubitably sound but the difficulties of proving modifications and variations in the old rules of law introduced by custom were at times almost insurmountable and the task often beyond the means of an average litigant. The effect of some of the pronouncements of the highest tribunal was to treat certain commentaries as having laid down the last word on every rule collocated and dealt with in them centuries ago and the task of the courts as no more than application of those self-same rules to a fast changing society. Referring to the arrest of progress suffered by Hindu law, Mr Mayne wrote that 'no voices were heard unless they came from the tombs'. Some ancient texts and injunctions favoured by the commentators which had not been accepted as part of current law and virtually abandoned in practice were in some cases received as binding law and given inflexible interpretation. All this tended in a large measure to unprecedented rigidity and to the creation of judge-made law, which from the inherent limitations on its scope could not be expected to respond adequately to all changing needs and circumstances. The only remedy was a comprehensive legislation in the form of a uniform code.

Codification.

Codification is a well-worn subject. Its chief apostle was Bentham and its greatest antagonist was Savigny. It has been said that they were both giants, to each of whom half his prayers were granted, whilst the other half was scattered to the winds. According to Savigny, 'law should be gradually developed by the silent internal forces of national consciousness with the least possible interference by the legislature'. Modern jurisprudence recognises the advantages of the transformation of well-developed and long established traditional and customary law into statutory form. It accepts innovations on the substance of existing law and even extirpation and substitution of any part of that law to ensure that it accords with the actual circumstances in which the people of a country are placed. Idealist and totalitarians had to agree that there existed large number of anomalies and inequitable rules in the complicated structure of Hindu law which could be dealt with only by legislation. It could no longer be denied that the fast moving conditions and the social, economic and political transformation in the country had rendered imperative substantial and radical changes in that law. It has to be admitted that far-reaching and fundamental changes had become inevitable for they alone could furnish fair and equable solutions to some of the most controversial questions relating to the law of marriage and succession.

Some relevant considerations.

The question of codification of Hindu law has been debated for nearly a century both by law reformers who like Bentham were staunch advocates of the theory of the utility of a code of laws and by others who like Savigny exaggerated the defects of a code

and declined to accept its practical utility. Bentham wrote that the great utility of a code of laws is to cause the debates of lawyers and the bad laws of former times to be forgotten and that its style should be characterised by force and harmony. The code of his dreams, one that would not require schools for its explanation or casuists to unravel its subtleties and be a complete self-sufficing enactment, was indubitably an ideal to be pursued but he pushed his theory too far when in his aim at finality he minimised all practical difficulties in the way of such legislation. Codification has all along been opposed by those who deprecated legislation in any shape or form in Hindu law on religious grounds and by some others on the ground that it would be impossible to give legislative form to the spacious and complicated structure that was Hindu law. Much of the opposition was grounded in sentiment and not in reason. Some objection belonged to the class of uninformed and orthodox element though it must be said that there was considerable sentiment born of reverence for an institution which had its roots in hoary antiquity. It was not realised by some dry traditionalists that the venerated authors of the *Dharmashastras* had themselves been progressive and tried to keep the law in harmony with their environments and in general responded to changing ideas, changing customs and the march of time.

Enactments.

The Hindu Law Committee appointed in 1941 to examine Hindu law recommended that it should be codified in gradual stages beginning with the law of intestate succession and marriage. The Committee ceased to function after making considerable progress and was revived in 1944. The Committee presided over by Sir Benegal Narsing Rau—known as the Rau Committee—made its report and presented a draft code. One of the objects of the committee was to evolve a uniform code of Hindu law which would apply to all Hindus by blending the most progressive elements in the various schools of law which prevailed in different parts of the country. The draft of the code presented by the Committee was to be regarded as an integral whole so that no part of it would be judged as if it stood by itself. The Hindu Law Bill remained on the anvil for a long time and ultimately those in charge of it decided to split it into certain parts and to move the Parliament after placing each part separately before it. The advantages of this were probably practical but one disadvantage was that it meant legislation by instalments. Such codification, however carefully done, cannot derive the full benefit of a preconceived plan of the whole system to be wrought upon. Instalments of a law intended to be uniform and to operate as an organic whole have come into operation at intervals during 1955 and 1956 and this must raise some problems and create some anomalous situations and this apart from the fact that the enactment which have so far found place on the statute-book leave an undetermined residue. The Hindu Marriage Act was enacted in May

1955, the Hindu Succession Act in June 1956, the Hindu Minority and Guardianship Act in August 1956 and the Hindu Adoptions as Maintenance Act in December 1956.

Fundamental Changes.

The changes brought about by the two principal enactments The Hindu Marriage Act, 1955, and The Hindu Succession Act, 1956 are pointed out in the 'Introductory Notes' to the commentaries to those Acts. It will suffice here to state that the alternative conditions which had arisen in matters social, economic and political made it imperative that polygamy should not be permitted and rules of succession should be equitable. The outstanding feature of the new Hindu Marriage Act is that monogamy is now enforced as a rule of law and bigamy is rendered punishable as a crime. The conditions and requirements of a ceremonial Hindu marriage are considerably simplified and any two Hindus, which expression includes not merely Hindus by religion but Buddhists, Jains and Sikhs as well, can solemnise the ceremonial marriage recognised by the Act. Relief by way of judicial separation, declaration of nullity of marriage and divorce are permissible under the Act. There is considerable force in the remark belonging to times long past that rules of succession to property being in their nature arbitrary, are in all systems of law mostly conventional and that even deeply rooted traditions may have to change with the march of time. The new Hindu Succession Act may seem to break violently with the past but it has to be conceded that it is characteristic of the age which is one of great ideals and fast changing theories. One outstanding feature of this Act is that it lays down a uniform system of inheritance for the whole country and lays down some simple rules relating to succession of the property of a Hindu male and female. The property of a male Hindu dying intestate after the commencement of the Act devolves in equal shares between his son, daughter, widow and mother. Male and female heirs are treated as equal without any distinction. Another notable feature of the Act is that any property possessed by a female Hindu is held by her as her absolute property and she has full power to deal with it and can even dispose of it by Will as she likes. The restraints and limitations of her power have ceased to exist even in respect of existing property, so that any property possessed by a female Hindu whether acquired by her before or after the commencement of the Act, is held by her as full owner and not as limited owner.

Right of women to be in *equalijura*.

The objects achieved by the new legislation are substantial unification of Hindu law by blending much that was progressive in the various schools of law which prevailed in different parts of the country and removal of many anomalies and incongruous injunctions. One aim of this legislation was to act, it is submitted rightly, on the principle that where the reason of the rule had ceased to exist there was little justification for insistence upon its perseverance. *Cessante ratione legis cessa ipsa lex*. Renascent India of the post-independence era appreciated the value of the

fresh and broadened outlook in matters affecting the rights social, economic and political of the citizen regardless of sex. Adult suffrage and political parity were forerunners to the recognition of all that was implicit in the Constitutional directives and fundamental guarantees of equality of status and equality before law enounced in the Constitution of India. The underscoring of the rights of women to be in *equali jura* finds concrete shape in the new legislation.

CHAPTER I

OPERATION OF HINDU LAW

SYNOPSIS

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§ 1. Personal Law: Hindus.—(1) Wherever the laws of India admit the operation of personal law, the rights and obligations of a Hindu are determined by Hindu law, that is, his traditional law, subject to the exception that any part of that law may be modified or abrogated by a statute.

(2) Hindus are divided into four castes,[1] namely:

(i) *Brahmins,* or the priestly caste;

(ii) *Kshatriyas*, or the warrior caste;

(iii) *Vaisyas*, or the agricultural caste; and

(iv) the *Sudras*.

Members of the first three castes are called twice-born or regenerate. The second birth or regeneration consists in the study of the *Vedas* or sacred literature and in the performance of *sanskaras* or sacraments. All these are denied to *Sudras*, except the *sanskara* of marriage.[2]

The above classification was of considerable importance prior to the enactments in 1955 and 1956. The classification, however, continues to be relevant in certain matters to be decided in accordance with the earlier law. In cases of adoption, the adopted son had to belong to the same caste as the adoptive father. In cases of marriage, according to one view, both the parties to the marriage had to belong to the same caste.

Scheduled Castes.—In *Arumugam v Rajagopal*,[3] the Supreme Court of India explained the meaning of caste in the wider sense and not merely in the context of the

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1 *Choutura v Suhub,* (1957) 7 MIA 18.
2 *Banerjee on Marriage and Stridhana*, 5th edition, pp 31, 37.
3 *Arumugam v Rajagopal,* AIR 1976 SC 939 : (1976) 1 SCC 863.

four primary castes. After the Constitution came into operation, the question of what is caste, what are the connotations and implications of the Scheduled Caste, has become of considerable importance and consequence.[4]

To further understand the implications of the Scheduled Caste, reference is invited to the observations of the Supreme Court of India in *Indira Sawhney v UOI*,[5] which has far-reaching implications inasmuch as it lays down various criteria for identification of backward classes.

Kayasthas.—It has been held by the High Court of Calcutta that *Kayasthas* as a general rule are *Sudras*.[6] On the other hand, it has been held by the High Courts of Allahabad[7] and Patna,[8] that they are not *Sudras*, but belong to one of the three regenerate classes, probably *Kshatriyas*.

Marathas.—There are three classes of Marathas in the Bombay state.[9]

Malayalam Brahmins.—Malayalam *Brahmins* are governed by the Hindu law and some of their rights have been regulated by the Kerala Nambudiri Act, 1958.[10]

Conversions.—Loss of caste: See § 7A infra.

Other castes.—For some other castes, see the cases discussed below.[11]

§ 2. Application of Hindu Law.—The power of the courts of India to apply Hindu law to Hindus is derived from and regulated by certain statutes of the British Parliament and by imperial and provincial legislation passed during the period of British rule, which unless altered or repealed, are to continue in force under the express provisions of Article 372 of the Indian Constitution.

§ 3. Extent of application of Hindu Law.—(1) The Hindu law as administered by the courts of India is applied to Hindus in some matters only.

(2) Throughout India, questions regarding succession, inheritance, marriage and religious usages and institutions, are decided according to Hindu law, except insofar as such law has been altered by legislative enactment.

(3) Besides the matters referred to above, there are certain additional matters in which Hindu law is applied to Hindus, in some cases by virtue of express legislation, and in others, on the principle of justice, equity and good conscience. These matters

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4 *Arumugam v Rajagopal*, AIR 1976 SC 939 : (1976) 1 SCC 863; *Principal, Guntur Medical College v Mohan Rao*, AIR 1976 SC 1904 : (1976) 3 SCC 411. Reference may also be made to *Khazan Singh v UOI*, AIR 1980 Del 60 and the cases cited there.

5 *Indira Sawhney v UOI*, AIR 1993 SC 477 : (1992) Supp (3) SCC 212, (Mandal Commission Report).

6 *Raj Coomar Lall v Bisessur Dyal*, (1884) 10 Cal 688; *Asita Mohan v Nerode Mohan*, (1916) 20 CWN 901, on appeal : (1920) 47 IA 140, p 145 : 24 CWN 794, p 798 : AIR 1920 PC 129; *Bhola Nath v Emperor*, (1924) 51 Cal 488 : 81 IC 70, pp 71–79 : AIR 1924 Cal 616; *Raj Nandini v Aswini Kumar*, (1941) 1 Cal 457 : AIR 1941 Cal 20 (Kayasthas).

7 *Tulsi Ram v Behari Lal*, (1890) 12 All 328, p 334.

8 *Ishwari Prashad v Rai Hari Prasad*, (1927) 6 Pat 506 : 106 IC 620 : AIR 1927 Pat 145.

9 *Subrao v Radha*. (1928) 52 Bom 497 : 113 IC 497 : AIR 1928 Bom 295 (Marathas).

10 *Govind Potti v Kesavan*, AIR 1987 SC 2236.

11 *Raj Nandini v Aswini Kumar*, (1941) 1 Cal 457; *Maharaja of Kolhapur v Sundaram*, (1925) 48 Mad 1 : 93 IC 705 : AIR 1925 Mad 497 (Marathas); *Mokka Kone v Ammakuti Ammal*, (1928) 51 Mad 1 (FB) : AIR 1928 Mad 299 (Yadavas); *Durga Das Pan v Santosh Kumar Pan*, (1945) 1 Cal 17 (Sadgopes); *Nagi v Rajkunwar*, AIR 1956 Nag 138 (Komatis).

are adoption, guardianship, family relations, wills, gifts and partitions. As to these matters also, Hindu law is to be applied subject to such alterations as have been made by legislative enactment.

§ 4. Acts modifying and abrogating rules of Hindu Law.—Fundamental and radical changes were made in 1955 and 1956 by the following Acts:

(1) The Hindu Marriage Act, 1955 (25 of 1955).

(2) The Hindu Succession Act, 1956 (30 of 1956).

(3) The Hindu Minority and Guardianship Act, 1956 (32 of 1956).

(4) The Hindu Adoptions and Maintenance Act, 1956 (78 of 1956).

The Hindu law had, prior to 1955, been modified and supplemented in certain respects by the following Acts:

(1) *The Caste Disabilities Removal Act, 1850.*—According to the Hindu law and usage, if a Hindu renounces his religion, or is excluded from the communion of that religion, or is deprived of caste, such renunciation, exclusion or deprivation entails a forfeiture of his rights and property, and deprives him of his right of inheritance. The effect of the above-mentioned Act was that these consequences ceased to be enforced as law in the courts of British India.[12] The Act is also known as the Freedom of Religion Act.

(2) *The Hindu Widows' Remarriage Act, 1856* [Now repealed by Act 24 of 1983 (w.e.f. 31 August 1983)].—This Act legalises the remarriage of Hindu widows in certain cases.

(3) *The Indian Succession Act, 1925, section 214 and Schedule III to the Act.*—These provisions are dealt with in the chapter on Wills.

(4) *The Converts' Marriage Dissolution Act, 1866.*—This Act enables a Hindu convert to Christianity to obtain a decree for dissolution of marriage under certain circumstances.

(5) *The Special Marriage Act, 1954.*

(6) *The Transfer of Property Act, 1882.*—This Act supersedes the whole of the Hindu law as to transfer of property.

(7) *The Majority Act, 1875.*—This Act, which fixes the age of majority on completion of the eighteenth year, applies to Hindus, except in matters of marriage, divorce and adoption.

(8) *The Guardians and Wards Act, 1890.*—This Act applies to Hindus in cases where a guardian has to be, or has been, appointed by the court.

(9) *The Hindu Inheritance (Removal of Disabilities) Act, 1928.*—This Act limits the disabilities which excluded a Hindu from inheritance and from a share on partition.

(10) *The Hindu Law of Inheritance (Amendment) Act, 1929.*—This Act admits the son's daughter, the daughter's daughter, the sister, and the sister's son, as heirs, next after the father's father and before the father's brother

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12 *Khunni Lal v Gobind Krishna*, (1911) 33 All 356 : 38 IA 87 : 10 IC 477; *Chidambaram v Ma Nyein Me*, (1928) 6 Rang 243 : AIR 1928 Pat 179.

for the purposes of inheritance. This Act is now repealed by section 31 of the Hindu Succession Act, 1956.

(11) *The Child Marriage Restraint Act, 1929.* [Now repealed by the Prohibition of Child Marriage Act, 2007 (6 of 2007) w.e.f. 1 November 2007.]

(12) *The Hindu Gains of Learning Act, 1930.*—This Act makes all acquisitions by means of learning the separate property of the acquirer.

(13) *The Hindu Women's Rights to Property Act 1937.*—This Act gives new rights of inheritance to widows, and strikes at the root of a Mitakshara coparcenary. This Act is now repealed by section 31 of the Hindu Succession Act, 1956.

(14) *The Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946.*—This Act is now repealed by section 29 of the Hindu Adoptions and Maintenance Act 1956.

§ 5. Enactments referred to in § 2.—A statement in a tabular form of the enactments referred to in § 2 was given in much earlier editions of this work (12th edition). It referred to the courts to which they applied and the extent to which the Hindu law was to be administered by those courts. That statement no longer being necessary, has been deleted.

§ 6. Persons governed by Hindu Law.—The four new enactments of 1955 and 1956, stated in § 4 above, expressly mention the persons to whom they are applicable. § 6 and § 7 are based on decisions of courts, relating to old uncodified Hindu law, determining persons governed by Hindu law and stating persons to whom Hindu law has been held not applicable. In *Yagnapurushdasji v Muldas*,[13] the Supreme Court explained who are Hindus and stated the broad features of the Hindu religion. In *Bhagwan Koer v Bose*,[14] which was ultimately decided by the Privy Council, it was observed that :

> The Hindu religion is marvellously catholic and elastic. Its theology is marked by eclecticism and tolerance and almost unlimited freedom of private worship. Its social code is much more stringent, but amongst its different castes and sections it exhibits wide diversity of practice.

In another judgment[15] that reflects the ethos of the word 'Hindu' most succinctly, and is the most appropriate exposition of the term 'Hindu', apart from the classic statement of the Calcutta High Court above, the Supreme Court stated :

> The legislature has not chosen to qualify the word 'Hindu' in any manner. The meaning of word is plain and who is a Hindu is well known. The legislature was well aware that 'Hindu' is a comprehensive expression (as the religion itself is) giving the widest freedom to people of all hues, opinion, philosophies and beliefs to come within its fold.

The Supreme Court, in judgment[16] has held that the Hindu religion incorporates all forms of belief without mandating the selection or elimination of any one

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13 *Yagnapurushdasji v Muldas,* AIR 1966 SC 1119 : (1966) 1 SCR 134.
14 *Bhavan Koer v Bose,* (1904) ILR 31 Cal 11.
15 *M.P.Gopalkrishnan Nair v State of Kerala,* AIR 2005 SC 3053.
16 *Adi Saiva Sivachariyargal Nala Sangam v The Government of Tami Nadu,* 2016 2 SCC 725 : 2015 (13) SCALE 714.

single belief. The Court stated that it is eternal faith and the collective wisdom and inspiration of the centuries that Hinduism seeks to preach and propagate.

The Hindu law applies:

(i) not only to Hindus by birth, but also to Hindus by religion, i.e. converts to Hinduism;[17]

In *Perumal v Ponuswami*,[18] the Supreme Court pointed out that a person may be a Hindu by birth or by conversion. A mere theoretical allegiance to the Hindu faith by a person born in another faith does not convert him into a Hindu, nor is a bare declaration that he is a Hindu sufficient to convert him to Hinduism. However, a *bona fide* intention to be converted to the Hindu faith, accompanied by conduct unequivocally expressing that intention, may be sufficient evidence of conversion. No formal ceremony of purification is necessary to effectuate conversion.

In *Commissioner of Wealth-tax v R Sridharan*,[19] the son of a Hindu father and a Christian mother who were married under the Special Marriage Act, 1954 was held by the Supreme Court to be a Hindu, having regard particularly to the fact that the father had unequivocally declared that he and his son formed a Hindu Undivided Family (hereinafter referred to as 'HUF'). [Also see § 7(4)].

(ii) to illegitimate children where both parents are Hindus;[20]

(iii) to illegitimate children where the father is a Christian and the mother is a Hindu, and the children are brought up as Hindus.

However, the Hindu law of coparcenary, which contemplates the father as the head of the family and the sons as coparceners by birth with rights of survivorship, cannot from the very nature of the case, apply to such children:[21]

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17 *Abraham v Abraham*, (1863) 9 MIA 195, p 243; *Jowala v Dharum*, (1866) 10 MIA 511, p 537; *Dagree v Pacotti*, (1875) 19 Bom 783, p 788; *Re Joseph Vadiar of Nazareth*, (1872) 7 Mad HC 121; *Morarji v Administrator-General*, (1929) 52 Mad 160 : 111 IC 364 : AIR 1928 Mad 1279; *Sahdeo Narain v Kusum Kumari*, (1922) 50 IA 58 : 2 Pat 230 : 71 IC 769 : AIR 1923 PC 21; *Palaniappa Chettiar v Alagan Chetti*, (1921) 48 IA 539 : 44 Mad 740 : 64 IC 439 : AIR 1922 PC 228; *Ganesh Mahto v Shib Charan Mahata*, (1932) 11 Pat 139 : 133 IC 165 : AIR 1931 Pat 305 following : (1928) 51 Mad 1 (FB) : 108 IC 760 : AIR 1928 Mad 299; *Sunder Devi v Jhoboo Lal*, AIR 1957 All 215 (inheritance to property of a Muslim woman converted to Hinduism). As to conversion, generally see *Chaturbhuj v Moreshwar*, AIR 1954 SC 236. As to when change of religion can be inferred, see *Ganpat v Returning Officer*, AIR 1975 SC 420; *D Neelima v Dean, PG Studies AP Agri University, Hyderabad*, AIR 1993 AP 229 (on marriage a wife acquires caste or tribe of her husband and also *gotra* and sapindaship, ceasing all ties with her paternal family).

18 *Perumal v Ponuswami*, AIR 1971 SC 2352. In *Bhaiya Sher Bahadur v Ganga Baksh*, (1913) 36 All 101, pp 115–116 : 41 IA 1, p 14, the Privy Council had left this question open. For object, nature and importance of rituals see *Seshammal v State of Tamil Nadu*, AIR 1972 SC 1586 : (1972) 2 SCC 11 (meaning of Saivites and Vaishnavites).

19 *Commissioner of Wealth-tax v R Sridharan*, (1976) 4 SCC 489; *K. Devabalan v M. Vijaykumari*, AIR 1991 Ker 175.

20 *Re Ram Kumari*, (1891) 18 Cal 264; *Dattaraya Tatya v Maha Bala*, (1934) 58 Bom 119 : 149 IC 821 : AIR 1934 Bom 36.

21 *Myna Boyee v Qataram*, (1961) 8 MIA 400.

(iv) to Jains,[22] Buddhists in India, Sikhs[23] and Nambudiri Brahmins,[24] except so far as such law is varied by customs and to Lingayats, who are considered Sudras;[25]

(v) to a Hindu by birth who, having renounced Hinduism, has reverted to it after performing the religious rites of expiation and repentance.[26] Or even without a formal ritual of reconversion, when he was recognised as a Hindu by his community;[27]

(vi) to sons of Hindu dancing girls of the Naik caste converted to Mohammedanism, where the sons are taken into the family of the Hindu grandparents and are brought up as Hindus;[28]

(vii) to Brahmos;[29] to Arya Samajists;[30] and to Santhals of Chota Nagpur;[31] and also to Santhals of Manbhum,[32] except so far as it is not varied by custom; and

(viii) to Hindus who made a declaration that they were not Hindus for the purpose of the Special Marriage Act, 1872.[33]

Many persons of aboriginal tribes and origins have been absorbed into the Hindu faith and have come under the sway of Hindu law. It would seem to be the accepted position that Hindu law applies to tribal people living in the interior parts of the country, whose way of life, habits and culture have been influenced by Hindus, generally so called and who profess Hinduism.[34] Naiks in Madhya Pradesh who were

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22 *Sheo Singh v Dakho*, (1978) 1 All 688 : 5 IA 87 (adoption); *Chotay Lall v Chunnoo Lall*, (1878) 4 Cal 744 : 6 IA 15 (inheritance); *Sheokurabai v Jeoraj*, (1920) 25 CWN 273, 275 : 61 IC 481 (PC); *Rup Chand v Jambu Parshad*, (1910) 37 IA 93 : 6 IC 272 (adoption); *Bhagvandas v Rajmal*, (1873) 10 Bom HC 241, 247 (adoption); *Thackersey v Hurbhum*, (1884) 8 Bom 432, p 453 (Jain temple); *Parshotam v Venichand*, (1921) 45 Bom 754, p 757 : 61 IC 492 : AIR 1921 Bom 147 (adoption); *Gateppa v Eramma*, (1927) 50 Mad 228 : 99 IC 503 : AIR 1927 Mad 228 (adoption), *Bhikabai v Manilal*, (1930) 54 Bom 780 : 128 IC 628 : AIR 1930 Bom 517 (alienation by Jain widow); *Jaiwanti v Anandi Devi*, (1938) 59 All 196 : 173 IC 356 : AIR 1938 All 62; *Suganchand v Mangibai* (1942) ILR Bom 467 : (1942) 44 Bom LR 358 : 20 IC 759 : AIR 1942 Bom 185.

23 *Rani Bhagwan Koer v Bose*, (1903) 31 Cal 11 : 30 IA 249; *Inder Singh v Sadhu Singh*, (1944) 1 Cal 233; *Bahadursingh v Dalipsingh*, AIR 1950 MB 1. As to Jat Sikhs, see *Pritam Singh v Asst Controller of Estate Duty*, 1979 PLR 342. As to conversion to Buddhism, see *Punjabrao v DP Mesharam*, AIR 1965 SC 1179 : (1965) 1 SCR 849.

24 *Vishnu v Akkamma*, (1911) 34 Mad 496 : 6 IC 583; *Narayan Iyer v Moorthi Kenden*, (1938) ILR Mad 897 : AIR 1938 Mad 643; *Narayanan Namboori v K Rai Varma*, AIR 1956 Tr & Coch 74 (Nambudiri Malayalam Brahmins in Travancore-Cochin).

25 *Tirkangauda v Shivappa*, ILR (1943) Bom 706 : 45 Bom LR 992 : AIR 1944 Bom 40.

26 *Kusum v Satya*, (1903) 30 Cal 999.

27 *Durga Prasada Rao v Sudarsanaswami*, AIR 1940 Mad 513; *Rajagopal v Arumugam*, AIR 1969 SC 101; *Arumugam v Rajagopal*, AIR 1976 SC 939 : (1976) 1 SCC 863; *Guntur Medical College v Mohan Rao*, AIR 1976 SC 1904 : (1976) 3 SCC 411.

28 *Ram Pergash v Mussammat Dahan Bibi*, (1924) 3 Pat 152 : 78 IC 749 : AIR 1924 Pat 420.

29 *In the goods of Jnanendra Nath Roy*, (1922) 49 Cal 1069.

30 *Mst Suraj v Attar*, (1922) 1 Pat 706, pp 713–14 : 67 IC 550 : AIR 1922 Pat 378; *Iswar Radhakanta v Khetra*, AIR 1949 Cal 253; *Shyamsunder v Shankar Deo*, AIR 1960 Mys 27; *Shiva Nand v Shri Shankarji Maharaj*, AIR 1984 All 55 (suit filed in the name of idol and also in his name by Manager-Aryasamajist).

31 *Chunka v Bhabani*, (1945) 24 Pat 727; *Langa v Jiba*, AIR 1971 Pat 185.

32 *Budhu v Dukhan* AIR 1956 Pat 123; *Langa v Jiba*, AIR 1971 Pat 185 (aboriginal Santhals of village Kutchai are Hindus).

33 Also see § 7(4); *Vidyagavri v Naradas*, AIR 1928 Bom 74; *Punyabrata Das v Monmohan Ray*, AIR 1934 Pat 427; *Thukru Bai v Attavar*, (1935) 58 Mad 1004 : AIR 1935 Mad 653.

34 Reference may be made to *Dhanuragya v Sukra*, AIR 1987 Ori 205.

originally of Gond origin are governed by Hindu law.[35] Rajgonds are not Hindus, but the presumption is that they are governed by Hindu law, unless the contrary is shown.[36] That presumption was applied by the Nagpur High Court in *Raja Chattar Singh v Diwan Roshan Singh.*[37]

As to Kurmi Mahtons of Chota Nagpur, see *Mohari Mahto v Mokaram Mahto,*[38] and the decisions cited there.

A person who is born a Hindu and has not renounced the Hindu religion, does not cease to be a Hindu merely because he departs from the standard of orthodoxy in matters of diet and ceremonial observances.[39] The acceptance of the *Granth Sahib* by the Udassis (a schismatic sect of Sikhs who remained within the fold of Hinduism is in no way inconsistent with their continuing as Hindus.[40] A Hindu does not by becoming a Jati Vaishnava (a sect in Bengal not recognising the caste system), cease to be a Hindu.[41]

§ 7. Persons to whom Hindu Law does not apply.—The Hindu law does not apply:

(1) to the illegitimate children of a Hindu father by a Christian mother who are brought up as Christians,[42] or to illegitimate children of a Hindu father by a Mohammedan mother;[43]

The persons falling under this category are not Hindus either by birth or by religion. In § 6, cll (ii) and (iii), the mother is a Hindu, but not so here.

(2) to the Hindu converts to Christianity;

Succession to the estate of a Hindu convert to Christianity, who dies as a Christian and intestate, is governed by the Indian Succession Act, 1865, now the Indian Succession Act, 1925. A person ceasing to be a Hindu in religion cannot, since the passing of the Act of 1865, elect to continue to be bound by Hindu law in matters of succession.[44] For decisions prior to 1865, see *Abraham v Abraham* and *Sri Gajapathi v Gajapathi.*[45]

The question whether a Hindu abandoned Hinduism and embraced Christianity is essentially one of fact, but may become a mixed question of law and fact.[46]

It is not settled whether the Hindu rule of survivorship is applicable to the families of native Christians, who continue to be joint even after conversion. Reference may

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35 *Nagi v Rajkunwar*, AIR 1956 Nag 138; *Rafail Uraon v Baiha Uraon*, AIR 1957 Pat 70.
36 *Dashrath Prasad v Lallosingh*, AIR 1951 Nag 343 : (1951) ILR Nag 873.
37 *Raja Chattar Singh v Diwan Roshan Singh,* (1946) ILR Nag 159 : AIR 1946 Nag 277.
38 *Mohari Mahto v Mokaram Mahto,* AIR 1963 AP 466.
39 *Rani Bhagwan Koer v Bose*, (1903) 31 Cal 11 : 30 IA 249; *Ma Yait v Maung Chit*, (1921) 49 Cal 310, p 321 : 48 IA 553, 562 : 66 IC 609 : AIR 1922 PC 197; *Ishwari Prasad v Rai Hari Prashad*, (1927) 6 Pat 506 : 106 IC 520 : AIR 1927 Pat 145 (Kayasthas of Bihar).
40 *Mahant Basant v Hem Singh*, (1926) 7 Lah 275 : 94 IC 695 : AIR 1926 Lah 100.
41 *Nalinaksha v Rajanikanta*, (1931) 58 Cal 1392 : 134 IC 1272 : AIR 1931 Cal 741.
42 *Lingappa v Esudasan*, (1904) 27 Mad 13 (maintenance).
43 *Charanjit Singh v Amir Ali Khan*, (1921) 2 Lah 243, p 248 : 64 IC 892 : AIR 1921 Lah 121.
44 *Kamawati v Digbijai Singh*, (1921) 43 All 525 : 48 IA 381 : 64 IC 559 : AIR 1922 Pepsu 14; *Dagree v Facotti* (1895) 19 Bom 783.
45 *Abraham v Abraham*, (1863) 9 MIA 195 : 241; *Sri Gajapathi v Gajapathi*, 14 WR PC 33.
46 See *Arumugam v Rajagopal*, AIR 1969 SC 101.

be made to *Tellis v Saldanha*; *Jogi Reddi v Chinnabbi Reddi*;[47] and *Francis Ghosal v Gabri Ghosal*; *Kulada v Haripada*.[48]

In *Anthonyswamy v Chinnaswamy*,[49] the Supreme Court held that the doctrine of pious obligation applies to the Tamil Vanniya Christian community and the son is bound to discharge his father's debts, not tainted by illegality or immorality. The doctrine, it was observed, is not opposed to any principles of Christianity.

(3) to converts from the Hindu to the Mohammedan faith;

The succession to the estate of a convert from the Hindu to the Mohammedan faith is governed by the Mohammedan law, and not by the Hindu law. Khojas and Cutchi Memons, who are converts from Hinduism to Mohammedanism, and who, in accordance with their customs have hitherto been governed by the Hindu law of inheritance and succession, will hereafter be governed by the Muslim personal law, except where the questions relate to agricultural lands [*vide* The Muslim Personal Law (Shariat) Application Act, 1937 (Act XXVI of 1937) and *Mulla's Mahomedan Law*].

(4) to the property of any person professing the Hindu, Sikh or Jain religion who married under the Special Marriage Act, 3 of 1872 or the property of the issue of such marriage. These are governed by sections 32 to 48 of the Indian Succession Act. Also see section 21 of the Special Marriage Act, 1954 and section 5(1) of the Hindu Succession Act, 1956.

§ 7A. Loss of caste: Reconversion to Hinduism.—The question of reconversion to Hinduism from any other religion, is of considerable importance and consequence. Some judgments of the Supreme Court need to be mentioned in order to appreciate the issue.

A person whose parents belonged to a Scheduled Caste before their conversion to Christianity can, on conversion or reconversion to Hinduism, be regarded as a member of the Scheduled Caste only if he is accepted as a member of that caste by the other members of the caste. On such acceptance he would be eligible for the benefit of reservation of seats for Scheduled Castes in the matter of admission to a medical college. It will be seen that on conversion to Hinduism, a person born of Christian converts would not become a member of the caste to which his parents belonged prior to their conversion to Christianity, automatically or as a matter of course, but he would become such member, if the other members of the caste accept him as a member and admit him within the fold. It is for the members of the caste to decide whether or not to admit a person within the caste. Since the caste is a social combination of persons governed by its rules and regulations, it may, if its rules and regulations so provide, admit a new member just as it may expel an existing member.[50]

In *Anbalagan v B. Devarajan*,[51] the case-law on the subject was critically examined and it was pointed out by the Supreme Court that the decisions on the subject clearly establish that:

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47 *Tellis v Saldanha*, (1887) 10 Mad 69; *Jogi Reddi v Chinnabbi Reddi*, (1929) 56 IA 6, pp 9–11 : 52 Mad 83, pp 87–90 : 114 IC 5 : AIR 1929 PC 13.

48 *Francis Ghosal v Gabri Ghosal*, (1907) 31 Bom 25; *Kulada v Haripada*, (1913) 40 Cal 407, pp 417–18 : 17 IC 257.

49 *Anthonyswamy v Chinnaswamy*, AIR 1970 SC 233.

50 *Principal, Guntur Medical College, Guntur v Y. Mohan Rao*, AIR 1976 SC 1904.

51 *Anbelgan v Devarajan*, AIR 1984 SC 411; *Kailash Sonkal v Maya Devi*, (1984) 2 SCC 91 : AIR 1984 SC 600(Reference may be made to the decisions cited therein).

> ...no particular ceremony is prescribed for reconversion to Hinduism of a person who has earlier embraced another religion. Unless the practice of the caste makes it necessary, no expiatory rites need be performed, and, ordinarily, he regains his caste unless the community does not accept him...The practice of caste however irrational...is so deep-rooted...that its mark does not seem to really disappear...even after some generations after conversion.

In *S. Swvigaradoss v Zonal Manager, F.C.I.*[52] it was however, held that:

> In view of the admitted position that the petitioner was born of Christian parents and his parents also were converted prior to his birth and no longer remained to be Adi Dravida, a Scheduled Caste for the purpose of Tirunelvedi District in Tamil Nadu as notified by the President, petitioner cannot claim to be a Scheduled Caste. In the light of the constitutional scheme civil court has no jurisdiction under Section 9 of CPC to entertain the suit. The suit, therefore, is not maintainable. The High Court, therefore, was right in dismissing the suit as not maintainable and also not giving any declaration sought for.

The Supreme Court has held that if the parents of a person are converted from Hinduism to Christianity and he is born after the conversion and embraces Hinduism and the members of the caste accept him, he comes within the fold of the caste. While dealing with the issue, the Court further held the decision in *Swvigaradoss* (*supra*) as *per incuriam,* as it had not taken into consideration the decision in *Principal, Guntur Medical College, Guntur v Y. Mohan Rao* (*supra*).

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52 *S. Swvigaradoss v Zonal Manager*, F.C.I., AIR 1996 SC 1182.

CHAPTER II

SOURCES OF HINDU LAW

SYNOPSIS

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§ 8. Sources of Hindu Law.—The three main sources of Hindu *dharma* or law are: (1) *Shruti*; (2) *Smriti*; and (3) custom.

A practical division of the sources of Hindu law would be: (1) original texts of the *Dharmashastras*; (2) commentaries and digests; and (3) customs. Hindu law at the present day is the result of many ingredients. To these main sources, must be added for all practical purposes, the auxiliary indices, justice, equity and good conscience, judicial decisions, and legislative enactment modifying or abrogating the previously existing law.

The sources of Hindu law have been considered in the Introduction to this book.

§ 9. Commentaries as a Source of Law.—The law of the *Smritis* was empiric and regressive, and in course of time, several commentaries and digests (*nibandhas*) were written on it. The authority of the several commentators varied in different districts, and thus arose the schools of law, which are operative in different parts of India.

§ 10. Judicial decisions as a Source of Law.—Judicial decisions on Hindu law are sometimes spoken of as a source of law.[1] The decisions of the Privy Council and the Supreme Court are binding on all the courts of India, including the High Courts; but the decisions of any one High Court are not binding on any other High Court, though they are binding on the courts subordinate thereto.[2]

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1 *Saraswathi v Jagadambal*, AIR 1953 SC 201, p 204 : (1953) 4 SCR 939.

2 *Korban Ally v Sharoda*, (1884) 10 Cal 82; *Balaji v Sakharam*, (1893) 17 Bom 555; *Amritlal v Jayantilal*, AIR 1960 SC 964 : (1960) 3 SCR 8421; *Dudh Nath v Sat Narain*, AIR 1966 All 315 (FB).

The Hindu law was at first administered by the English judges with the assistance of Hindu *pundits*. The institution of *pundits* as official referees of courts was abolished in 1868.

§ 11. *Mitakshara* and *Dayabhaga* Schools.—(1) "The remote sources of the Hindu law (that is *Smritis*) are common to all the different schools. The process by which those schools have been developed seems to have been of this kind. Works universally or very generally received became the subject of subsequent commentaries. The commentator put his own gloss on the ancient text; and his authority having been received in one and rejected in another part of India, schools with conflicting doctrines arose."[3]

(2) There are two schools of law, namely, *Mitakshara* school and *Dayabhaga* school. *Dayabhaga* school prevails in Bengal; while the *Mitakshara* school prevails in other parts of India.

(3) For *Marumakkattayam*, *Aliyasantana* and *Nambudiri* systems of law, see 'Introduction' to the book.

(4) *Mitakshara* is a running commentary on the Code of *Yajanavalka*. It was written by Vijnaneshwara in the later part of the eleventh century.[4] *Dayabhaga* is not a commentary on any particular code, but purports to be a digest of all codes. It was written by Jimutavahana in the beginning of the twelfth century.[5]

(5) *Mitakshara* is applicable throughout India except in Bengal, where *Dayabhaga* is of supreme authority. However, even in Bengal, *Mitakshara* is still regarded as of very high authority on all questions in respect of which there is no express conflict between *Mitakshara* and *Dayabhaga*, and the other works prevalent there.[6] *Dayabhaga* may also be referred to in a *Mitakshara* case, on points on which the latter treatise is silent.[7]

(6) It is said that the *Mitakshara* school is the orthodox school, and the *Dayabhaga* school is the reformed school of Hindu law. *Dayabhaga* school is also called the Bengal school of Hindu law.

(7) The Bengal school differs from the *Mitakshara* school in two main particulars, namely, the law of inheritance and the joint family system.

§ 12. Sub-divisions of *Mitakshara* School.—(1) The *Mitakshara* school is subdivided into four minor schools; these differ between themselves in some matters of detail, relating particularly to adoption and inheritance. All these schools acknowledge the supreme authority of *Mitakshara*, but they give preference to certain treatises and to commentaries which control certain passages of *Mitakshara*. This accounts for the differences between those schools.[8]

The sub-schools and the principal works, which supplement *Mitakshara* in each sub-school, are given in Table II.1:

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3 *Collector of Madura v Moottoo Ramalinga*, (1868) 12 MIA 397, p 435.
4 See 'Introduction' to the book.
5 *Ibid.*
6 *Bhagwandeen v Myna Baee*, (1867) 11 MIA 487, pp 507–508; *Collector of Madura v Moottoo Ramalinga*, (1868) 12 MIA 397 at 435; *Akshay v Hari Das*, (1908) 35 Cal 721.
7 *Rai Bishen Chand v Asmaida Koer*, (1884) ILR 6 All 560, 572 : LR 11 IA 164, 179 (PC); *Mahabir Prasad v Raj Bahadur Singh*, (1943) 18 Luck 585 : 203 IC 244 : AIR 1943 Ori 27.
8 *Bhagwandeen v Myna Baee*, (1867) 11 MIA 487, pp 507–508.

Table II.1

Benares School	Viramitrodaya[9] Nirnayasindhu[10]
Mithila School	Vivada Chintamani[11] Vivada Ratnakara[12] Madana Parijata[13]
Maharashtra or Bombay School (Western India)	Vyavahara *Mayukha*[14] Viramitrodaya Nirnayasindhu
Dravida or Madras School (Southern India)	Smriti Chandrika[15] Parashara Madhaviya[16] Saraswati Vilasa[17] Vyavahara Nirnaya[18]

(2) As regards authorities in Western India, *Mitakshara* ranks first and paramount in Maharashtra, Northern Kanara and the Ratnagiri district. In Gujarat, the Island of Bombay and the North Konkan, the *Mayukha* is considered as the overruling authority, where there is a difference of opinion between *Mayukha* and *Mitakshara*.[19]

The principle, however, adopted by the High Court of Bombay, and sanctioned by the Privy Council, is to construe the two works, so as to harmonise them with each other, wherever and so far as that is reasonably possible.[20] In Poona, Ahmednagar and Khandesh, the *Mayukha* is considered to be of equal authority with

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9 See 'Introduction' to the book.
10 *Ibid.*
11 *Ibid.*
12 *Ibid.*
13 *Ibid.*
14 *Ibid.*
15 *Ibid.*
16 *Ibid.*
17 *Ibid.*
18 *Ibid.*
19 *Krishnaji v Pandurange,* (1875) 12 Bom HC 65; *Lallubhai v Mankwarbai*, (1878) ILR 2 Bom 388, 418; *Sakharam v Sitabai*, (1879) 3 Bom 353, p 365; *Balkrishna v Lakshman*, (1890) 14 Bom 605; *Jankibai v Sundra*, (1890) 14 Bom 612 (Mahad is not within Northern Konkan); *Narhar v Bhau*, (1916) 40 Bom 621 : 36 IC 539 : AIR 1916 Bom 206.
20 Per Teglang J, in *Gajabai v Shrimant Shahjirao*, (1896) 17 Bom 114, 118 approved in *Bai Kesserbai v Hunsraj*, (1906) 30 Bom 431, p 442 : 33 IA 176; *Bhagwan v Warubai*, (1908) 32 Bom 300, p 312; *Mahabir Singh*, (1943) 18 Luck 585 : AIR 1943 Ori 27.

Mitakshara, but not capable of overruling it as in Gujarat, the Island of Bombay and the North Konkan.[21]

§ 13. Works on adoption.—The two special works on adoption are the *Dattaka Mimansa* and the *Dattaka Chandrika*. Generally speaking, they are equally respected throughout India, but where they differ, the *Dattaka Mimansa* is preferred in Mithila and Benares, and the *Dattaka Chandrika* in Bengal.[22]

With regard to these two works, their Lordships of the Privy Council said:

> Both works have had a high place in the estimation of Hindu lawyers in all parts of India, and having had the advantage of being translated into English at a comparatively early period, have increased their authority during the British rule.[23]

As to the *Dattaka Chandrika*, it may be said that in Bengal there is a tradition that it is a literary forgery by Raghumani Vidyabhushana, who was the *Pundit* of Colebrooke, the celebrated English translator of numerous Sanskrit works on Hindu law. It is said that it was written to help a claim set up by an adopted son to a Raja in Bengal.

In *Abhiraj Kuer v Debendra Singh*,[24] the Supreme Court examined the text of Nandpandita in *Dattaka Mimansa*—'*Viruddha sambandho purto varjaneeyah*'—and held that it was merely recommendatory [reference, § 477(3)].

§ 13A. Personal law: Rule of presumption.—A Hindu family residing in a particular state of India is presumed to be governed by the law of the place in which it resides.[25] The mere transfer, however, of a district to another presidency or state for administrative purposes, is not sufficient to affect the personal law of the residents in that district, unless and until it is shown, in the case of any resident there, that he had intended to change and has in fact changed his personal law.[26]

The rule that a Hindu family residing in a particular state is *prima facie* governed by the law of that place, is not founded on any doctrine affecting *lex loci*. The rule rests on personal law and status. In general, it may be said that in matters of status, there is no *lex loci* in India and every person is governed by the law of his personal status.[27]

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21 *Bhagirthibai v Kahnujirao*, (1887) 11 Bom 285, p 294 (FB), *Bhaskar v Laxmibai*, AIR 1953 Nag 326 (Kunbis from Maharashtra); *Kanaiyalal v Dhanji*, AIR 1952 Kutch 18 (Kutch was regarded as part of Bombay); *Kammathi v Padmavathi*, AIR 1952 Tr & Coch 501 (Gowda Saraswatha *Brahmins* of Travancore).

22 *Balusu v Balusu*, (1899) 22 Mad 398; *Radha Mohan v Hardai Bibi*, (1898) 21 All 460, pp 465–66; *Bhagwan Singh v Bhagwan Singh*, (1898) 21 All 412, p 419 : 26 IA 153, p 161; *Puttu Lal v Parbati Kunwar*, (1915) 37 All 359, p 367 : 42 IA 155, p 161, 29 IC 617 : AIR 1915 PC 15; *Collector of Madura v Moottoo Ramalinga*, (1868) 12 MIA 397 at 437; *Laxman v Bayabai*, (1955) ILR Nag 656 : AIR 1955 Nag 241; *Anandi Lal v Onkar*, AIR 1960 Raj 251; *Bodo v Dondo*, AIR 1952 Ori 307 (Oriyas from the Madras area).

23 *Balusu v Balusu*, (1899) ILR 22 Mad 398, pp 411–12 : 26 IA 113, pp 131–32.

24 *Abhiraj Kuer v Debendra Singh*, AIR 1962 SC 351: (1962) 3 SCR 627; *Vallabhalalji v Mahalaxmi Bahuji*, AIR 1962 SC 356 : (1962) 3 SCR 641 : 64 Bom LR 433.

25 *Ram Das v Chandra*, (1893) 20 Cal 409; *Chandrakanto v Ram Mohini*, AIR 1956 Cal 577.

26 *Somasekhara v Mahadeva*, AIR 1936 PC 18 : 38 Bom LR 317 : 159 IC 1079, in appeal from (1930) 53 Mad 297, AIR 1930 Mad 496; *Chennamma v Srinivas*, AIR 1971 Mys 28.

27 *Nataraja Pillai v Subbaraya Chettiar*, 77 IA 33, (1950) ILR Mad 862, 1950 PC 32, (1950) 52 Bom LR 474; *Vasant Atmaram v Dattoba*, (1955) 57 Bom LR 1026, (1955) ILR Bom 1021, AIR 1956 Bom 49; *Udebhan v Vikram*, AIR 1957 MP 175; *Chandrakanto v Ram Mohini*, AIR 1956 Cal 577; *Duggamma v Ganeshayya*, AIR 1965 Mys 97.

§ 14. Migration and school of law.—(1) Where a Hindu family migrates from one state to another, the presumption is that it carries with it, its personal law, that is, the laws and customs as to succession and family relations prevailing in the state from which it came. However, this presumption may be rebutted by showing that the family has adopted the law and usage of the province to which it has migrated.[28]

(2) It is the law existing at the time of migration that continues to govern the migrated members until it is renounced. It is the law in force in the state at the time of their leaving, which continues to govern persons who have migrated to another state. Thus, they are affected by decisions of the courts of their state of origin, which declare the correct law of the state up to the time of their leaving it, but not by customs incorporated in its law after they have left it.[29]

These authoritative statements as regards the applicability of a particular school of law to a particular person, therefore, point to the conclusion that such assertions of applicability of a specific school of law would be inexorably dependant upon the pleadings and assertions of the parties, and the evidence adduced by them on such assertions.[30]

Illustrations

(1) A Hindu family migrates from the North-Western Provinces, where *Mitakshara* law prevails, to Bengal, where *Dayabhaga* law prevails. The presumption is that it continues to be governed by *Mitakshara* law, and this presumption may be supported by previous instances of succession in the family according to *Mitakshara* law after its migration and by evidence relating to ceremonies performed in the family at marriages, births and *shraddhs*, showing that the

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28 *Srimati Parbati v Jagadis*, (1902) 29 Cal 433 : 29 IA 82; *Sorrendranath v Heeramonee*, (1869) 12 MIA 81; *Arjun Singh v Virendra*, AIR 1971 All 29; *Govind v Radha*, (1910) 34 Bom 553, 7 IC 459; *Sarada Prasanna v Umakanta*, (1923) 50 Cal 370 : 77 IC 450 : AIR 1923 Cal 485; *Benoy Krishna v State of West Bengal*, AIR 1987 Cal 190 (even after generations until new domicile of choice is accepted); *Jagadamba v Satyanaraynan*, (1961) Mad 841, (1961) 2 Mad LJ 297; *Mailathi v Subbaraya*, (1901) 24 Mad 650 (migration by a Hindu widow from French India to British India); *Kulada v Haripada*, (1913) 40 Cal 407 : 17 IC 257; *Sukhbir Singh v Mangeisar Rao*, (1927) 49 All 302 : 100 IC 778 : AIR 1927 All 252; *Babu Motising v Durgabai*, (1929) ILR 53 Bom 242 : 114 IC 379 : AIR 1929 Bom 57; *Basant Kumar Basu v Ramshanker Ray*, (1932) 59 Cal 859; 138 IC 882; *Bijay Lal v Bhubaneswar*, AIR 1963 Cal 18; *Parbati v Jagadis*, (1902) 29 Cal 433; *Suganchand v Mangibai*, (1942) Bom 467 : 201 IC 759 : AIR 1942 Bom 185; *Kachrulal v Nandlal*, (1955) ILR Nag 618; *Naya v Motilal*, AIR 1959 Bom 282 : (1959) Bom 727 : 60 Bom LR 1154; *Udebhan v Vikram*, AIR 1957 MP 175 (Maharashtrian Telis in Madhya Pradesh, held governed by *Mayukha*); *Anjubai v Hemchandrarao*, AIR 1960 MP 382 (Marathas settled in Chattisgarh in Madhya Pradesh held governed by the Bombay school); *Sitabai v Tuljabai*, AIR 1963 MP 322 (Leva Patidar Kulmees from Gujarat); *Gigi v Panna*, AIR 1956 Assam 100 (custom regarding matters of adoption among Marwaris); *Laxman v Gangabai*, AIR 1955 MB 138 (Maharashtrian Brahamins resident in Malwa); *Brindaban v Chandubala*, (1951) ILR 2 Cal 225; *Nathulal v Rangoba*, (1951) ILR 2 Cal 225; *Nathulal v Rangoba*, (1952) ILR Nag 597; *Pralhad v Damodhar*, AIR 1958 Bom 79 (Agarwals in Berar); *Hirabai v Bhagirathibai*, AIR 1969 MP 241 (Maharashtrian Mahars living in Nagpur and Berar); *Madhai Kumar v Sabi Bewa*, AIR 1973 Pat 208; *Chitradevi v Chembagavalli*, AIR 1999 Mad 38 (*Mitakshara* law of Tamil Nadu applicable, not of Pondicherry).

29 *Balwant Rao v Baji Rao*, (1920) 47 IA 213 : 57 IC 545 : AIR 1921 PC 59, *Saraswati v Debenara*, AIR 1956 Pat 340 (migration before development of law in the state of origin); *Rukhmabai v Ramratan*, (1951) ILR Nag 367, AIR 1951 Nag 350; *Pakul Majhi v Subhdra*, AIR 1969 Ori 3.

30 *Diwan Singh v Bhanja Lal*, AIR 1997 MP 210 (FB) relying upon *Ramdayal v Maneklal*, AIR 1973 MP 222 (FB).

family continued to be governed by *Mitakshara* law after its migration.[31] If the migration is proved, and it is also proved that the family followed the customs of *Mitakshara* school, it is not necessary to prove also that the family immigrated to Bengal after the establishment of *Dayabhaga* system of law.[32]

(2) A joint Hindu family, consisting of two brothers *A* and *B*, migrates from the North-Western Provinces to Bengal. *A* dies, leaving a widow *C*. The presumption being that this family continues to be governed by *Mitakshara* law, the joint property will, on *A*'s death, pass to his surviving brother *B*, and *C* will be entitled to maintenance only. However, if the family had renounced *Mitakshara* law and adopted *Dayabhaga* law, *A*'s share would pass to his widow *C*.[33]

A Maharashtrian family residing in Chattisgarh, in Central Provinces, is presumed to have come as immigrant and if it retains its individuality as Maharashtrian, is governed by the Bombay interpretation of *Mitakshara*.[34] Similarly, a Rajput family which migrated to Berar, and was proved to have retained its old manners and customs was to be governed by the Benares school and not the Bombay school of Hindu law.[35]

In *Abdurahim v Halimabhai*,[36] their Lordships of the Privy Council said:

> Where a Hindu family migrates from one part of India to another *prima facie* they carry with them their personal law, and, if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted, but when such a family emigrate (from India) to another country (East Africa), and, being themselves Mohammedans (e.g. Memons), settle among Mohammedans, the presumption that they have accepted the law of the people whom they have joined seems to their Lordships to be one that should be much more readily made. The analogy is that of a change of domicile on settling in a new country rather than the analogy of a change of custom on migration within India. Of course, if nothing is known about a man except that he lived in a certain place, it will be assumed that his personal law is the law which prevails in that place. In that sense only his domicile is of importance.[37]

The law must be the family law as it was when they left. A judgment declaratory of law, as having always been, would bind, but it would be a different thing if subsequent customs became incorporated in the law.[38]

Raghuvanshis of Nandurbar.—The Raghuvanshis of Nandurbar migrated from Oudh and settled in Khandesh and they are governed by the Benares school of Hindu law.[39]

Hindus of North Canara.—The Hindus of North Canara are governed by the Bombay school of Hindu Law and not by the Madras school of Hindu law.[40] Komtis of Chanda district are governed by *Mitakshara* and not by the Madras school of law.[41]

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31 *Parbati v Jagadis*, (1902) ILR 29 Cal 433, p 452, 29 IA 82.
32 *Ramesh Chandra v Mohammed*, (1923) 50 Cal 898 : 79 IC 309 : AIR 1924 Cal 383.
33 *Parbati v Jagadis*, (1902) ILR 29 Cal 433 : 29 IA 82.
34 *Keshao Rao v Sadasheorao*, (1938) ILR Nag 469 : AIR 1938 Nag 163.
35 *Lalsingh v Vithal Singh*, (1950) ILR Nag 62 : AIR 1950 Nag 62.
36 *Abdurahim v Halimabhai,* (1916) 43 IA 35, p 41: 18 Bom LR 635:, 32 IC 413, AIR 1915 PC 86; *Ma Yait v Maung Chit Maung*, (1921) 49 Cal 310 : 48 IA 553 : 564 IC 609 : AIR 1922 PC 197.
37 *Balwant Rao v Baji Rao*, (1920) 47 IA 213, p 219 : (1921) ILR 48 Cal 30, p 39 : 57 IC 545 : AIR 1921 PC 59 : 25 Cal WN 243; *Tula Ram v Shyam*, (1927) 49 All 848 : 86 IC 729.
38 *Balwant Rao v Baji Rao,* (1920) 47 IA 213, p 222 : 57 IC 545 : AIR 1921 PC 59 : Cal WN 243.
39 *Babu Motising v Durgabai*, (1929) ILR 53 Bom 242 : AIR 1921 PC 59.
40 *Venkanna Narasinha v Laxmi*, AIR 1951 Bom 57; *Manjapa v Lakshmi*, (1890) 15 Bom 234; *Mahabaleshwar v Durgabai*, (1896) 22 Bom 199; *Shantaram v Krishna*, (1947) Bom 798, contra; *Dattatraya v Laxman*, (1941) 44 Bom LR 527; *Shantaram v Mahabaleshwar*, (1947) 49 Bom LR 764.
41 *Ramlu v Vithal*, (1947) ILR Nag 267.

Yelmis of Berar.—The Yelmis of Berar are governed by the Madras school of law.[42]

§ 15. Custom as a source of law.—Custom is one of the three sources of Hindu law. When there is a conflict between a custom and a text of the *Smritis*, the custom overrides the text: 'Under the Hindu system of law, clear proof of usage will outweigh the written text of the law'.[43] For further reference, see 'Introduction' to the book. *Rattigan's Digest of Customary Law* which is regarded as authoritative on the subject of customs in Punjab.[44]

§ 16. Three kinds of customs.—The Hindu customs recognised by the courts are: (1) local; (2) class; and (3) family customs.

§ 17. Essentials of a valid custom.— (1) A custom is a rule, which in a particular family or a particular class or community, or in a particular district, has from long usage, obtained the force of law. It must be ancient, certain, and reasonable, and being in derogation of the general rules of law, must be construed strictly.[45] It is further essential that it should be established to be so, by clear and unambiguous evidence, for it is only by means of such evidence that the courts can be assured of its existence and of the fact that it possesses the conditions of antiquity and certainty on which alone its legal title to recognition depends.[46] It must not be opposed to morality or public policy, and it must not be expressly forbidden by the legislature.[47] It must not be in derogation of the fundamental rights of the citizen to hold and to dispose of property by absolutely prohibiting alienation of property even after actual division.[48] Where the evidence shows that the custom alleged was not followed in numerous instances, the custom could not be held to be proved.[49] A custom derives its force from the fact that it has, from long usage, obtained the force of law. It must be ancient; but it is not of the essence of this rule that its antiquity must in every case be carried back to a period beyond the memory of man. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such

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42 *Mahadeo v Vyankammabai*, (1947) ILR Nag 781.

43 *Collector of Madura v Moottoo Ramalinga*, (1869) 12 MIA 397, 436; *Vannia Kone v Vennichi Ammal*, (1928) 51 Mad 1 : 108 IC 760 : AIR 1928 Mad 299.

44 *Daya Singh v Dhan Kaur*, AIR 1974 SC 665.

45 *Hurpurshad v Sheo Dyal*, (1876) 3 IA 259, p 285.

46 *Ramalakshmi v Sivanantha*, (1872) 14 MIA 570, pp 585–586; *Siromani v Hemkumar*, AIR 1968 SC 1299; *Pushpavathi v Visweswar*, AIR 1954 SC 118; *Harihar Prasad v Balmiki Prasad*, AIR 1975 SC 733. See as to evidence of custom. *Gopalayyan v Raghupatiayyar*, (1873) 7 Mad HC 250; *Mirabiviv v Raghupatiayyar*, (1873) 8 Mad 464; *Harnabah v Mandil*, (1900) ILR 27 Cal 379; *Rup Chand v Jambu Parsad*, (1910) 32 All 247, p 252 : 37 IA 93 : 6 IC 272; *Abdul Hussein Khan v Bibi Sona Dero*, (1918) 45 Cal 450 : 45 IA 10 : 43 IC 306 : AIR 1917 PC 181; *Ram Narain v Har Narinjan Kaur*, (1923) 4 Lah 297 : 76 IC 535 : AIR 1924 Lah 116; *Vannia Kone v Vannichi Ammal*, (1928) 51 Mad 1 : 108 IC 760 : AIR 1928 Mad 299; *Bhikabai v Manilal*, (1930) 54 Bom 780 : 128 IC 628 : AIR 1930 Bom 517; *Gulam Chand v Manni Lal*, (1941) 16 Luck 302 : 192 IC 643 : AIR 1941 Ori 230; *Talasiram v Ramprasanna*, AIR 1956 Ori 41; *Subramania v Kumarappa*, AIR 1955 Mad 144 : 1955 (1) MLJ 355; *Narayani Amma v Sankara Pillai*, AIR 1961 Ker 149 (FB) : (1960) ILR Ker 1366.

47 *Vannia Kone v Vannichi Ammal*, (1928) 51 Mad 1; *Balusami v Balakrishna*, AIR 1957 Mad 97.

48 *Sheikriyammada Koya v Administrator*, AIR 1967 Ker 259 (custom prohibiting alienation even after actual division among *tavazhis* of a *tarwad*).

49 *Ishwarbai v Bhagwandas*, AIR 1950 Sind 26.

invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality.[50]

(2) It is incumbent on a party setting up a custom to allege and prove the custom on which he relies. Custom cannot be extended by analogy. It must be established inductively and not by *a priori* methods. Custom cannot be a matter of mere theory but must always be a matter of fact and one custom cannot be deduced from another.[51] It is a well-established law that custom cannot be enlarged by parity of reasoning, since it is the usage that makes the law and not the reason of the thing.[52]

In *Saligram v Munshi Ram*,[53] the Supreme Court was considering a case of custom under section 5 of the Punjab Laws Act.

(3) Where the proof of a custom rests upon a limited number of instances of a comparatively recent date, the court may hold the custom proved, so as to bind the parties to the suit and those claiming through and under them; but the decision would not in that case be a satisfactory precedent, if, in any future suit between other parties, fuller evidence with regard to the alleged custom should be forthcoming.[54] A judgment relating to the existence of a custom is admissible to corroborate the evidence adduced to prove such custom in another case.[55] Where, however, a custom is repeatedly brought to the notice of the courts, the courts may hold that the custom was introduced into law without the necessity of proof in each individual case.[56]

Family Custom.—In respect of family custom, the same principles are applicable, though, of course, in this case, instances in support of the custom may not be as many or as frequent as in case of customs pertaining to a territory or to the community or to the character of any estate. In dealing with family customs, the consensus of opinion among members of the family, the traditional belief entertained by them and acted upon by them, their statements and their conduct would all be relevant and it is only where the relevant evidence of such a character appears to the

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50 *Laxmibai v Bhagwanthuwa,* AIR 2013 SC 1204 (see for detailed discussion on custom); *Gokal Chand v Parvin Kumari*, AIR 1952 SC 231, p 234 : (1952) 1 SCR 825; *Subhani v Nawab*, 68 IA 1, 193 IC 436 : AIR 1941 PC 21, p 32.

51 *Saraswati v Jagdambal*, (1953) 4 SCR 939; *Thankamma v Narayan Pallai*, AIR 1958 Ker 35 (FB); (1958) ILR Ker 108.

52 *Laxmibai v Bhagwanthuwa,* AIR 2013 SC 1204 (custom only by clear evidence; not by analogy); *Venkata Challamma v Cheekati*, AIR 1953 Mad 571; *Deivanai v Chidambaram Chettiar*, AIR 1954 Mad 657; *Narasayya v Ramchandrayya*, AIR 1956 AP 209; *Thankamma v Narayana*, AIR 1958 Ker 35 (FB).

53 *Saligram v Munshi Ram,* AIR 1961 SC 1374.

54 *Chiman Lal v Hari Chand*, (1913) 40 IA 156, p 160 : 19 IC 669; *Rup Chand v Jambu Parshad*, (1910) 37 IA 93, p 104 : 6 IC 272; *Parshottam v Venichand*, (1921) 45 Bom 754, 760, p 761 : 61 IC 492 : AIR 1921 Bom 147; *Kasiviswanatham v Somasundaram*, (1946) 51 CWN 374, (PC).

55 *Mst Kesarbai v Somasundaram*, (1946) ILR Nag 1 : 71 IA 190.

56 *Munnalal v Rajkumar*, AIR 1962 SC 1493, 1498; *Ujgar Singh v Jeo*, AIR 1959 SC 1041 : 1959 Supp (2) SCR 781; *Rama Rao v Rajah of Pittapur*, (1918) 45 IA 18 : 47 IC 354 : AIR 1918 PC 81; *Hemendra Nath Roy v Jnanendra*, AIR 1935 Cal 702 : 62 Cal LJ 49; *Banarsi Das v Sumat Prasad*, (1936) 58 All 1019 : 164 IC 1047 : AIR 1936 All 641; *Suganchand v Mangibai*, (1942) Bom 467 : 201 IC 759 : AIR 1942 Bom 185; *Kaliamma v Janardhanam*, AIR 1973 SC 1134 (very small community in a small local area: decision should have been based on evidence); *Smt. Ass Kaur (Deceased) by L. Rs. v Kartar Singh (Dead) by L. Rs.*, AIR 2007 SC 2369 : (2007) 5 SCC 561 (judicial notice of repeated custom-Zamindara custom amongst Sikh Jats of Punjab; widow marrying her husband's brother succeeds to co-widow in preference to collaterals; custom was not expressly excluded by the Hindu Women's Right to Property Act, 1937 or Hindu Law of Inheritance (Amendment) Act, 1929).

courts to be sufficient, that a specific family custom pleaded in a particular case can be held to be proved.[57] Custom binding inheritance in a particular family has long been recognised in India.[58]

§ 18. Discontinuance of custom.—A family usage, like a local custom, must be certain, invariable and continuous, but it may be discontinued so as to let in the ordinary law. Well-established discontinuance of a family usage, whether it has arisen from accidental causes, or has been intentionally brought about by the concurrent will of the family, has the effect of destroying the custom; it is different, however, in the case of a local custom, which is the *lex loci* binding on all persons within the local limits in which it prevails.[59]

§ 19. Burden of proof of custom.—Where members of a family admittedly governed by the Hindu law, set up a custom derogatory to that law, the burden lies upon them to prove the custom.[60] In the case of a tribe or family, who were not originally Hindus, and have only adopted Hindu usages in part, if it is alleged by any member that a particular Hindu usage has been adopted by the tribe or family, the burden lies upon him to prove the usage.[61]

The Kurmi Mahtons of Chota Nagpur, though aboriginals in origin, have accepted the Hindu religion and Hindu social usage. The presumption in law will, therefore, be that they are governed by the Hindu law of succession and the party who alleges a special custom to the contrary, has to prove the same.[62]

§ 20. Invalid custom.—No custom is valid if it is opposed to morality or public policy or to any express enactment of the legislature.[63]

§ 20A. Principles of Equity.—Where there is no rule of Hindu law and no proof of existence of any custom, rules of justice, equity and good conscience will apply.[64]

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57 *Pushpavathi Vijayaram v P Visweswar*, AIR 1964 SC 118, p 125, 126; *Harihar Prasad v Balmiki Prasad*, AIR 1975 SC 733 : (1975) 1 SCC 212 (nature and quality of evidence, succession).

58 *Abdul Hussein Khan v Bibi Sona Dero*, (1917) 45 Cal 450, p 460 : 45 IA 10, p 14 : 43 IC 306 : AIR 1917 PC 181.

59 *Rajkishen v Ramjoy*, (1876) 1 Cal 186, p 196 (PC), *Sarabjit v Indarjit*, (1905) 27 All 203; *Vannia Kone v Vannichi Ammla*, (1928) 51 Mad 1.

60 *Bhagwan Singh v Bhugwan Singh*, (1890) 21 All 412, p 423; *Chandrika Bakhsh v Muna Kaur*, (1902) 24 All 273 : 29 IA 70; *Rup Chand v Jambu Prasad*, (1910) 37 IA 93 : 6 IC 272; *Sahdeo Narain Deo v Kusum Kumari*, (1923) 50 IA 59, pp 62–64 : 71 IC 769 : AIR 1923 PC 21; *Gurunath v Kamlabai*, AIR 1955 SC 206; *Shamlal v Jiyabal*, (1943) ILR Nag 678 : AIR 1944 Nag 62; *Indramani Devi v Raghunath Bhanja*, AIR 1961 Ori 9.

61 *Fanindra Deb v Rajeswar*, (1885) 11 Cal 463, p 476 : 12 IA 72, p 88; *Muhammad Ibrahim v Shaikh Ibrahim*, (1922) 49 IA 119 : 67 IC 115 : AIR 1922 PC 59; *Ramrudharsiingh v Dileshwar Singh*, AIR 1965 Pat 117 (FB).

62 *Ganesh Mahto v Shib Charan Mahata*, (1932) 11 Pat 139 : 133 IC 165 : AIR 1931 Pat 305.

63 *Balusami v Balakrishna*, AIR 1957 Mad 97.

64 *Saraswathi v* Jagadambal, AIR 1953 SC 201, p 204.

CHAPTER III

GENERAL PRINCIPLES OF INHERITANCE

SYNOPSIS

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LAW PRIOR TO THE HINDU SUCCESSION ACT, 1956

Note.—The Hindu Succession Act, 1956 that came into force on 17 June 1956, codified the law of intestate succession among Hindus. It brought about fundamental and radical changes in the law of succession, as will be seen from the Introductory Note to the commentary on that Act. Overriding application has been given to that Act, and in effect, it repeals all previous laws relating to intestate succession whether textual, customary or statutory. The Act, however, subject to a few exceptions, is not retroactive in its operation and succession to the property of a male or female Hindu, who died intestate before 17 June 1956, is governed by the previous law discussed in Chapters III–XI.

§ 21. Law of inheritance.—The joint and undivided family is the normal condition of Hindu society. An undivided Hindu family is ordinarily joint, not only in estate, but also in food and worship.

The joint family system comes first in the historical order. The law of inheritance is of later growth and, in general, applies only to property held in absolute severalty by the last owner, as distinguished from property held by a *Mitakshara* joint family. However, after the Hindu Women's Rights to Property Act, 1937 (18 of 1937)* came into operation, the interest, which a Hindu, governed by any school of law other than *Dayabhaga* or by customary law, had in joint family property, devolved upon his death on his widow. Moreover, after the coming into force of the Hindu Succession Act, 1956, the position is governed by section 6 of that Act.

§ 22. Two systems of inheritance.—There are two systems of inheritance amongst the Hindus in India namely, *Mitakshara* system and *Dayabhaga* system.

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* Now repealed by the Hindu Succession Act, 1956 (30 of 1956).

The *Dayabhaga* system prevails in Bengal, while the *Mitakshara* system is applicable to other parts of India. The difference between the two systems arises from the fact that, while the doctrine of religious efficacy is the guiding principle under *Dayabhaga* School (§ 79), there is no such definite guiding principle under the *Mitakshara* School. Sometimes consanguinity, and at other times, religious efficacy has been regarded as the guiding principle (§ 36).

§ 23. Inheritance to males and females.—Succession to *stridhana*, that is, property held absolutely by a female, is governed by rules different from those, which governed inheritance to the property of a male.

Chapters IV & VII deal with the inheritance to males according to *Mitakshara* School and *Dayabhaga* School respectively. Succession to *stridhana* is dealt with in Chapter X.

§ 24. Modes of devolution of property.—(1) *Mitakshara* recognises two modes of devolution of property, namely, survivorship and succession. The rules of survivorship apply to joint family property, and the rules of succession apply to property held in absolute severalty by the last owner.

(2) *Dayabhaga* recognises only one mode of devolution, namely, succession. It does not recognise the rule of survivorship even in the case of joint family property. The reason is that, while every member of a *Mitakshara* joint family has only an undivided interest in the joint property, a member of a *Dayabhaga* joint family holds his share in *quasi*-severalty, so that it passes on his death to his heirs, as if he was absolutely seized thereof, and not to the surviving coparceners as under *Mitakshara* law.

Illustrations

(1) *A* and *B*, two Hindu brothers, governed by the *Mitakshara* School of Hindu law, are members of a joint and undivided family. *A* dies leaving his brother *B* and a daughter. *A*'s share in the joint family property will pass to his brother, the surviving coparcener, and not to his daughter. However, if *A* and *B* were separate, *A*'s property would on his death pass to his daughter as his heir.

(2) *A* and *B*, two Hindu brothers, governed by *Dayabhaga* school, are members of a joint and undivided family. *A* dies leaving his brother *B* and a widow. *A*'s share in the joint family property will pass to his widow as his heir, exactly as if *A* and *B* were separate.

§ 25. Female heirs.—The law on inheritance by female heirs is not uniform. According to the Bengal, Benares and Mithila schools, there are only five females who can succeed as heirs to a male, namely: (1) the widow; (2) daughter; (3) mother; (4) father's mother; and (5) father's father's mother. To this list, three more were added by the Hindu Law of Inheritance (Amendment) Act, 1929, namely, the son's daughter, daughter's daughter and sister. The Madras School recognises a large number of female heirs including the three mentioned in the Act of 1929, and the Bombay School a still larger number. Under the Hindu Women's Right to Property Act, 1937 (18 of 1937),* the widow of a predeceased son and the widow of a predeceased son of a predeceased son are among the heirs to a Hindu's separate property in all the schools.

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* Now repealed by the Hindu Succession Act, 1956 (30 of 1956).

§ 26. Limited estate of females.—(1) Males succeeding as heirs, whether to a male or to a female, take the property absolutely.

(2) Females succeeding as heirs, whether to a male or to a female, take a limited estate in the property inherited by them, except in certain cases in the Bombay state.

If a separated Hindu under *Mitakshara*, or any Hindu under *Dayabhaga*, dies leaving a widow and a brother, the widow succeeds to the property as his heir, but the widow, being a female, does not take the property absolutely. She is entitled only to the income of the property. She can neither make a gift of the property nor can she sell, unless there is a legal necessity, either for the gift or for the sale. On her death, the property will not pass to her heirs, but to the next heir of her husband, i.e., his brother.

(3) Section 14 of the Hindu Succession Act, 1956, subject to certain qualifications, confers full heritable capacity on a female heir in respect of all property acquired by her, whether before or after the commencement of that enactment.

§ 27. 'Last full owner' and 'fresh stock of descent'.—The last 'full' owner of property is one who held the property absolutely at the time of his death. Except in the case of *stridhana* and in certain cases in the Bombay presidency, the last full owner is always a male.

It is a 'full' owner who can become a fresh stock of descent. Since a female cannot (except as aforesaid) be a full owner of property, she cannot become a fresh stock of descent.

Illustration

A dies leaving a widow, a mother, a brother *B*, and a paternal uncle *C*. On *A*'s death, the widow succeeds to his property as his heir. She takes only a limited estate in the property. She is not the full owner of the property, and she cannot, therefore, become a fresh stock of descent. On her death, the property will revert to the next heir of the last full owner *A*, that is, the mother. The mother, again, does not take absolutely. She too, therefore, cannot become a fresh stock of descent, and on her death, the property will go not to her heirs, but to the next heir of the last owner *A*, that is *B*, *A*'s brother. However, *B*, being a male, takes the property absolutely. He becomes full owner of the property and he can, therefore, become a fresh stock of descent. On his death, the property will pass to his own heirs. Thus, if he leaves a widow, the property will pass to her, and not to *C*. However, since she takes a limited estate only, the property will, on her death, revert to the next heir of *B*, the last full owner. If that heir is *C*, the property will pass to him. *C*, being a male, will take the property absolutely and on his death it will pass to his heirs.

A woman's *stridhana* descends to her own heirs (see Chapter X).

§ 28. Inheritance never in abeyance.—(1) On the death of a Hindu, the person who is then his nearest heir becomes entitled at once to the property left by him. The right of succession vests in him immediately on the death of the owner of the property. It cannot, under any circumstance, remain in abeyance[1] in expectation of

1 *Shakuntala Devi v Kaushalya Devi*, (1936) 17 Lah 356 : AIR 1936 Lah 124 : 162 IC 718; *Srinivasa Rao v Annadhanam Seshacharlu*, (1942) Mad 42 : 198 IC 169 : AIR 1942 Mad 106 : (1941) 2 MLJ 406.

the birth of a preferable heir, where such heir was not conceived at the time of the owner's death.[2]

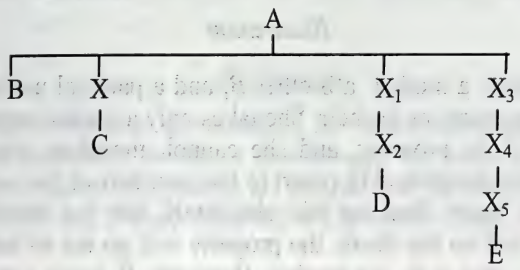
(2) Where the estate of a Hindu has vested in a person, who is his nearest heir at the time of his death, he cannot be divested of the property, except either by the birth of a preferable heir such as a son or a daughter,[3] who was conceived at the time of his death, or by adoption in certain cases of a son to the deceased.[4]

§ 29. Doctrine of representation.—A son or a grandson, whose father is dead, and a great-grandson, whose father and grandfather are both dead, all succeed simultaneously as one heir to the separate and self-acquired property of their paternal ancestor. The reason is that the grandson represents the rights of his father to a share and the great-grandson represents the rights both of his father and grandfather. This is the only case to which the doctrine of representation applies; it does not apply to any other case,[5] e.g., the case of a daughter.[6] Sons, grandsons, and great-grandsons, inheriting together as aforesaid, succeed to the estate of the deceased as coparceners [§ 31, Illustration (a)]. On a partition among them, they take *per stirpes* and not *per capita*.

Illustrations

(a) *A*, a male Hindu, dies leaving a son *B*, a grandson *C*, a great grandson *D*, and a great great grandson *E*, as shown in Table III.1.

Table III.1



On *A*'s death, his estate will pass to *B*, *C* and *D* as coparceners. If they continue joint, and if any one of them dies without leaving male issue, his share will pass to the survivors. If they want to divide the estate, it will be divided into three equal parts, *B*, *C* and *D*, each taking one part. *B* alone is not entitled to inherit the whole property. *C* will take the share of his father *X*, and *D*, the share of his grandfather X_1. *E*, is not entitled to any share at all,

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2 The statement of the law in § 28 was cited with approval by the Supreme Court in *Shrinivas v Narayan*, (1955) 1 SCR 1, p 16 : 57 Bom LR 678 : AIR 1954 SC 379.

3 *Bayaya v Parvateya*, (1933) 35 Bom LR 118 : 144 IC 442 : AIR 1933 Bom 126.

4 *Nilcomul v Jotendro*, (1881) 7 Cal 178, p 188; *Kalidas v Krishan*, (1869) 2 Beng LR 103 (FB); *Tagore v Tagore*, (1872) 9 Beng LR 377, p 397; *Bamundoes v Tarinee*, (1858) 7 MIA 169, pp 184, 206; *Narasimha v Veerabhadra*, (1894) 17 Mad 287; *Gordhandas v Bai Ramcoover*, (1902) 26 Bom 449, p 467; *Hira v Buta*, (1919) 1 Lah LJ 36 : 56 IC 256 : AIR 1920 Lah 160; *Sooramma v Venkataratnam*, (1951) 2 MLJ 664 : AIR 1952 Mad 166 (a stillborn son is not regarded as a posthumous son).

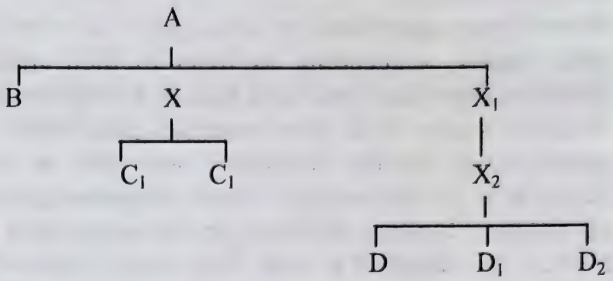
5 *Marudayi v Doraiswami*, (1907) 30 Mad 348; *Soshil Chand v Mangat Ram*, (1954) ILR Punj 449.

6 *Lorandi v Nihal Devi*, (1925) 6 Lah 124 : 95 IC 701 : AIR 1925 Lah 403; *Soshil Chand v Mangat*, (1954) Punj 449 : AIR 1954 Punj 26 (widow). The doctrine does not apply to *stridhana* succession; *Krishnaswami v SS Chettiar*, AIR 1955 Mad 702 : (1955) 2 MLJ 541, nor does it extend to the case of a predeceased legitimate son of a *Sudra*; *Govindarajulu v Balu Ammal*, AIR 1952 Mad 1 : (1951) 2 MLJ 209.

for he is more than four degrees removed from *A*, and the right of representation does not extend beyond four degrees.

(b) *A*, a male Hindu, dies leaving a son, *B*, two grandsons *C* and C_1, and three great-grandsons *D*, D_1, D_2 as shown in Table III. 2.

Table III.2



A's property will be divided, if the heirs choose to divide it, into three equal parts, of which *B* will take one, *C* and C_1 will together take one, and *D*, D_1, D_2 will together take one. This is a division of the estate *per stirpes*. To divide it *per capita*, would be to divide it into six parts, and give one part to each of the six heirs.

Note.—If *B* had a son B_1, *B* would take one–third for himself and B_1, and it would become ancestral property in the hands of *B*, to which B_1's right would attach by birth.

(c) *A*, a separated male Hindu, dies leaving a brother *B*, and nephew *C*, being the son of a predeceased brother *D*. On *A*'s death, *C* claims half the estate alleging that had his father *D* been alive, he would have taken one-half and that he *C* is entitled to that half as representing his father. *C*'s claim must be rejected, for the right of representation is confined to the lineal male descendants of the deceased owner as stated in the section, and *C* is not such a descendant. *B* therefore is entitled to the whole estate as the nearest heir of *A*.

The position under *Mayukha* is somewhat different (see § 77).

§ 30. *Spes successionis*.—The right of a person to succeed as heir on the death of a Hindu is a mere *spes successionis*, that is, a bare chance of succession. It is not a vested interest; he cannot, therefore, make a valid transfer of it.[7] For the same reason, any agreement entered into by him in respect of inheritance cannot bind persons who actually inherit when the succession opens.[8]

Illustration

A has a brother *B* and uncle *C*. *B* has a wife *D*. It is true that if *A* died, *B* would succeed as his nearest heir if he was then alive; but in the lifetime of *A*, *B* does not take any interest in *A*'s property. All that he is entitled to is a bare chance of succession. If he predeceases *A*, the heir on *A*'s death will be *C*, and not his widow *D* (See illustration in § 29). *B* does not take any interest in *A*'s property in *A*'s lifetime, and he cannot transmit to his heir *D*, an interest which had not accrued to himself. For the same reason, a sale or a mortgage by *B* of the *spes successionis* is a nullity. Moreover, if he makes any contract with respect to inheritance in *A*'s lifetime, and predeceases *A*, and *C* succeeds as *A*'s heir, the agreement is not binding on *C*.

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7 See Transfer of Property Act, 1882, section 6.

8 *Brojo v Gouree*, (1870) 15 WR 70; *Bahadur Singh v Mohar Singh*, (1902) 24 All 94 : 29 IA 1.

§ 31. Co-heirs.—(1) According to *Mitakshara* school, two or more persons inheriting jointly take as tenants-in-common,[9] except the following four classes of heirs, who take as joint tenants with rights of survivorship:

(a) two or more sons, grandsons, and great-grandsons, who are living as members of a joint family,[10] succeeding as heirs to the separate or self-acquired property of their paternal ancestor;[11]

(b) two or more grandsons by a daughter, who are living as a member of a joint family, succeeding as heirs to their maternal grandfather.[12] The Madras High Court has held that in a property inherited by two or more daughter's sons from their maternal grandfather, there can be no right of survivorship and the daughter's sons take as tenants-in-common.[13] The decision in *Venkayyamma v Venkataramanayyamma* has been held to be no longer a binding authority on the nature and incidents of property inherited by daughter's sons from their maternal grandfather; [also see § 221 (2)].

(c) two or more widows succeeding as heirs to their husband;[14]

(d) two or more daughters succeeding as heirs to their father,[15] except in the Bombay state, where they take an absolute estate in severalty.[16]

(2) According to the *Dayabhaga* School, two or more persons inheriting jointly take as tenants-in-common, except only (1) widows; and (2) daughters who take as joint tenants with rights of survivorship.

Illustrations

(a) A Hindu, who is possessed of separate property, dies leaving two sons *A* and *B*. *A* dies leaving a daughter *C*.

According to the Bengal school, *A* and *B* inherit as tenants-in-common, and, therefore on *A*'s death, his share in the property goes to his heir *C* by succession. According to *Mitakshara*

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9 *Karuppai v Sankaranarayanam*, (1904) 27 Mad 300; *Ram Bharosey v Ram Bahadur*, (1948) 23 Luck 58.

10 The statement of law on the point has been altered by adding the words 'who are living as members of a joint family'.

11 Also see § 222 and notes thereunder. *Raja Jogendra v Nityanand*, (1890) 18 Cal 151 : 17 IA 128; *Madivalappa Irappa v Subbappa Shankreppa*, (1937) Bom 906 : 39 Bom LR 895 : AIR 1937 Bom 438 : 172 IC 184; *Shyam Behari Singh v Rameshwar Prasad Sahu*, (1941) 20 Pat 907 : 198 IC 208 : AIR 1942 Pat 213; *Gangadhar v Ibrahim*, (1927) 25 Bom LR 197; *Marudayi v Doraisamy*, (1907) 30 Mad 348. In *Hari Kishan v Rajeswar*, (1952) Punj 134 : AIR 1952 Punj 165, the Punjab High Court expressed the view that the rule applies only if the sons, grandsons and great-grandsons had not separated from the deceased. In *Ragho Sambhaji v Shantabai*, (1957) 59 Bom LR 999, the Bombay High Court has followed the Punjab decision. Reference may be made to *Ranganatha v Kumaraswami*, AIR 1959 Mad 253; *Girdharilal v Fatehchand*, AIR 1955 MB 148 and § 222 and notes thereunder.

12 *Venkayyamma v Venkataramanayyamma*, (1902) 25 Mad 678 : 29 IA 156; *Muhammad Husain Khan v Babu Kishva Nandan Sahai*, (1937) 64 IA 250 : (1937) All 655 : 39 Bom LR 979 : 169 IC 9 : AIR 1937 PC 233; *Seri Ram v Chandramma*, (1952) Hyd 45.

13 *Godavari Lakshminarasamma v Godavari Rama Brahman*, (1950) 63 MLW 258 : AIR 1950 Mad 680.

14 *Bhugwandeen v Myna Baee*, (1860) 11 MIA 487.

15 *Chotay Lall v Chunno Lall*, (1897) Cal 744 : 6 IA 15; *Aumirtolall v Rajoneeka*, (1875) 2 IA 113, p 126 : 15 Beng LR 10, 24; *Venkayyamma v Venkataramanayyamma*, (1902) 25 Mad 678 : 29 IA 156; *Chhattar Singh v Hukum Kunwar*, (1936) 58 All 391.

16 *Vithappa v Savitri*, (1910) 34 Bom 510 : 7 IC 445.

school, *A* and *B* inherit as joint owners, who are living as members of a joint family. Therefore, if *A* dies without having partitioned the property, his undivided interest in the property will pass to his brother *B* by survivorship to the exclusion of his daughter *C*. However, if the property was partitioned between *A* and *B*, the share which came to *A* on partition would go to his heir *C* by succession. Assuming that *A* and *B* did not divide the property, and that *A* dies leaving a son, grandson, or a great-grandson, the undivided interest of *A* would pass to his son, grandson, or great-grandson by survivorship, in preference to his undivided brother *B*. The reason is that the right of survivorship of male issue always prevails over that of collateral with whom the deceased was joint.

(b) A Hindu dies leaving two widows *A* and *B*. According to both the schools, the widows succeed as joint tenants. On *A*'s death, therefore, her interest in the property will pass to *B* by survivorship (§ 43, No 4).

(c) A Hindu dies leaving two daughters *A* and *B*. According to both the schools, they succeed as joint tenants. On *A*'s death, therefore, her undivided interest in the property will pass to *B* by survivorship. It is different, however, in the Bombay state. In that state, *A* and *B* take an absolute estate in severalty, and not as joint tenants. Therefore, on *A*'s death, her one-half share will pass to her own heirs by succession. Thus, if *A* dies leaving a daughter, her share will go to her daughter, and not to her sister *B* (§ 43 No 5).

(d) A Hindu dies leaving two brothers. The brothers take as tenants-in-common and on the death of either of them, his one-half will pass to his heirs by succession. The same rule applies to uncles, nephews etc.

§ 32. Succession *per stirpes* and *per capita*.—Except in the two cases hereinafter mentioned, persons of the same relationship to the deceased take *per capita*, that is, the estate of the deceased is divided into as many shares as the number of heirs, each taking one share.

Exception I.—On a partition among them, the sons, grandsons and great-grandsons of a deceased male Hindu take *per stirpes* (§ 29).

Exception II.—Sons' sons, daughters' sons, and daughters' daughters, succeeding to *stridhana* take *per stirpes*.[17]

Brother's sons, uncle's sons, etc., take *per capita*. Thus, if a Hindu dies leaving two sons by one brother and three sons by another brother, the property will be divided into five equal parts, each taking one-fifth. This is division of the estate *per capita*. To divide it *per stirpes* would be to divide it into two equal parts, giving one part to the two sons of one brother, and the other part to the three sons of the other brother. The reason why they take *per capita* is that the brother's sons do not inherit as representing their father but in their own right as the nephews of the deceased (§ 29). Similarly, if a Hindu dies leaving one son by a paternal uncle and two sons by another paternal uncle, the estate will be divided into three parts, each son taking one-third.[18]

Exceptions I and II both rest on special texts. For an illustration of Exception I, see § 29, illustration (b). For an illustration of Exception II, see § 160.

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17 See § 160; *vide* authorities cited under § 160.
18 *Narsappa v Bharmappa*, (1921) 45 Bom 296 : 59 IC 251.

CHAPTER IV

ORDER OF INHERITANCE OF MALES ACCORDING TO *MITAKSHARA* LAW

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LAW PRIOR TO THE HINDU SUCCESSION ACT, 1956

Note.—Reference may be made to the Note to Chapter III.

§ 33. *Mitakshara* law of inheritance.—The rules of inheritance laid down in *Mitakshara* are followed by the Bombay, Madras, Benares and Mithila schools, all the schools being sub-divisions of *Mitakshara* school. However, the rules of inheritance in force in the several states represented by these schools are not entirely the same. They differ in certain respects, namely:

(1) the order of inheritance as laid down in *Mitakshara* is not strictly followed in the island of Bombay, Gujarat and the North Konkan. The reason is that in those places preference is given to the *Vyavahara Mayukha* of Nilkanta Bhatta on few points, where it differs from *Mitakshara*;

(2) as regards females, there are many who are recognised as heirs in the Bombay and Madras schools, but are not recognised as such in the Benares and Mithila schools (§§ 61–70).

§ 34. Devolution of property according to *Mitakshara* law.—In determining the mode in which the property of a Hindu male, governed by *Mitakshara* law, devolves on his death, the following propositions are to be noted:

(1) where the deceased was, at the time of his death, a member of joint and undivided family, technically called coparcenary, his undivided interest in the coparcenary property devolves on his coparceners by survivorship (see Act XVIII of 1937 and § 35);

(2) (i) *even if the deceased was joint at the time of his death, he might have left self-acquired or separate property. Such property goes to his heirs by succession according to the order given in § 43, and not to his coparceners;*[1]

(ii) *if the deceased was at the time of his death, the sole surviving member of a coparcenary property, the whole of his property, including the coparcenary property, will pass to his heirs by succession according to the order given in § 43;*[2]

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1 *Katama Natchiar v Rajah of Shivagunga*, (1863) 9 MIA 539; *Sivagnana Tevar v Periasami*, (1878) 1 Mad 312 : 5 IA 61.

2 *Naqalutchmee v Gopoo Nadaraja*, (1856) 6 MIA 309.

(iii) *if the deceased was separate at the time of his death from his coparceners, the whole of his property, however acquired, will pass to his heirs by succession according to the order given in § 43;*[3]

(3) if the deceased was re-united at the time of his death, his property will pass to his heirs by succession according to the rule laid down in § 60.

Illustration

AB and his brother constitute a coparcenary. *AB* dies leaving a daughter. He leaves self-acquired property. He also leaves property inherited by him from his maternal uncle, which, according to law, is his separate property. The undivided interest of *AB* in the coparcenary property will pass to his brother as surviving coparcener, but his self-acquired and separate property will pass to his daughter as his heir.

§ 35. Act XVIII of 1937.—The Hindu Women's Rights to Property Act, XVIII of 1937* (amended by XI of 1938), introduced important changes in the law of succession. This short enactment, which came into force on 14 April 1937, is as under:

WHEREAS it is expedient to amend the Hindu law to give better right to women in respect of property:—

It is hereby enacted as follows:—

1. Short title and extent.—(1) The Act may be called the Hindu Women's Rights to Property Act, 1937.

(2) It extends to the whole of India[4] except Part B States.[5]

2. Application.—Notwithstanding any rule of Hindu law or custom to the contrary, the provisions of section 3 shall apply where a Hindu dies intestate.

3. Devolution of property.—(1) When a Hindu governed by *Dayabhaga* School of Hindu law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu Law or by customary law dies intestate leaving separate property, his widow,[6] or if there is more than one widow all his widows together, shall, subject to the provisions of sub-section (3), be entitled in respect of property in respect of which he dies intestate to the same share as a son:

Provided that the widow of a predeceased son[7] shall inherit in the like manner as a son if there is no son surviving of such predeceased son, and shall inherit in

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3 *Doorga Persad v Doorga Konwari*, (1878) 4 Cal 190, p 202 : 5 IA 149, p 160.

* Now Repealed by Act 30 of 1956.

4 Unless expressly adopted, the Act cannot be applied to territories, which were outside British India when the Act was passed, *Bhanbai v Devji*, AIR 1950 Kutch 43.

5 Hindus who had migrated from Part B States (formerly outside British India and settled in Part A states (in former Bitish India) were governed by the provision of the Act, even if they had retained their personal law. *Rukhmabai v Ramratan*, (1951) ILR Nag 367 : AIR 1951 Nag 350; *Pannalal v Sitabai*, (1954) ILR Nag 30 : AIR 1953 Nag 70; *Ratan Kumari v Sunder Lal*, AIR 1959 Cal 787. Only properties in Part B States are excluded and not properties situated within the areas to which the Act applied and belonging to Hindus domiciled in Part B States, *Shripati v Fullbai*, AIR 1981 Bom 224 (beneficial construction).

6 The expression 'widow' in the Act, though used in the singular, includes all the widows left by the deceased if there are more than one, *Bhiwra v Renuka*, (1949) Nag 400; *Umayal Achi v Lakshmi Achi*, AIR 1945 FC 25 : (1945) FCR 1 : (1945) 1 MLJ 108.

7 *Asarfa Kuer v Bhuneshwar Rai*, AIR 1959 Pat 210 : ILR 37 Pat 206.

like manner as a son's son if there is a surviving son or son's son of such predeceased son:

Provided further that the same provision shall apply *mutatis mutandis* to the widow of a predeceased son of a predeceased son.

(2) When a Hindu governed by any school of Hindu Law other than *Dayabhaga* School or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had.

(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner.

(4) The provisions of this section shall not apply to an estate which by a customary or other rule of succession or by the terms of the grant applicable thereto descends on a single heir or to any property to which the Indian Succession Act, 1925, applies.

4. Savings.—Nothing in this Act shall apply to the property of any Hindu dying intestate before the commencement of this Act.

5. Meaning of expression 'die intestate'.—For the purposes of this Act, a person shall be deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.

The Act was repealed by section 31 of the Hindu Succession Act, 1956. Rights acquired and liabilities incurred under the Act are however not affected because of section 6 of the General Clauses Act, 1897 (X of 1897).[8] In this context, it is essential to note the provisions contained in section 14 of the Act of 1956, which lay down a rule having some restrospective operation.

The Act came into force from 14 April 1937. As some difficulties were felt in the interpretation of the Act, it was amended on 8 April 1938 by Act 11 of 1938. The amending Act was made retroactive and operated from the date of the main enactment. The main enactment, as in terms stated in section 4, is not retrospective in operation and does not apply to the property of any Hindu, who dies intestate before the commencement of the Act.[9] Nor does it apply to the widow of any coparcener, who died before the Act came into force.[10]

The validity of the Act was questioned in some cases and it was held by the Federal Court that the Act did not operate to regulate succession to agricultural lands in the governor's provinces, or to a mortgagee's interest or a lessee's interest in such land,[11] but was not *ultra vires* as to other lands.[12] The validity of the Act

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8 See sections 4 (b), 14 and 31 of the Hindu Succession Act, 1956, and notes thereunder.

9 *Umayal Achi v Lakshmi Achi*, AIR 1945 FC 25 : (1945) FCR 1 : (1945) 1 MLJ 108; *Lakhan Lal v Richu Mian*, AIR 1960 Pat 181; *Jasoda Kuer v Phul Kuer*, AIR 1958 Cal 600; *Mohari v Chukli*, AIR 1960 Raj 82; *Ratan Kumari v Sunder Lal*, AIR 1959 Cal 787.

10 *Moni Dei v Hadibadhu*, AIR 1955 Ori 73 (FB); *Suraj Mal v Babu Lal*, AIR 1985 Del 95 (section 14 of the Hindu Succession Act not attracted).

11 *Kotayya v Annapurnamma*, (1945) Mad 777; *Ramaswami v Murugayyan*, (1945) Mad 781 : AIR 1945 Mad 191.

12 *Re* The Hindu Women's Rights to Property Act of 1937 and the Hindu Women's Rights to Property Amendment Act of 1938 and *Re* a special reference under section 213 of the Government of India Act, 1935—(1941) FCR 72; *Anant Lal v Ram Adhar*, 17 Luck 720 : 198 IC 443 : AIR 1943 Ori 216. For Coorg, see *PA Machiah v MB Ponnava*, AIR 1973 Mys 1.

was again upheld by the Federal Court in another case.[13] After the decision of the Federal Court relating to agricultural lands, some of the provinces extended the operation of the Central Act to succession to agricultural lands by passing suitable legislation.[14]

The measure was intended to redress disabilities and 'to give better rights to women'. It was ameliorative in character and enacted to carry out important social reform.[15] It introduced far-reaching changes in the law of succession and was obviously intended to give better rights to women by recognising their claim to fair and equitable treatment in certain matters of succession. However, unfortunately, the rules of devolution set out in the Act are so penned that there have arisen anomalies and a number of conundrums, and an attempt to resolve one difficulty has often caused misconception and equally great, if not greater difficulties in other cases.[16]

The Act, in its consequence, touched many branches of Hindu law, such as joint family and partition, adoption, maintenance and disqualification from inheritance and illustrates how piecemeal legislation can result in contradictions and unexpected situations. It has raised problems, which do not admit of logically consistent answers,[17] and the difficulties found in interpreting the enactment have been pointed out in numerous decisions.[18] The Act was not a codifying enactment or even a general, amendment of the law of inheritance. Its proper construction required that it must be fitted into the context of the law existing at the time it was enacted[19] and read in the light of its ameliorative character and expressed intention to give better right to women.[20] In *Umayal Achi v Lakshmi Achi*,[21] the Federal Court observed:

> 'Its proper construction and operation must be determined with reference to conditions and contingencies likely to arise after its commencement.'

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13 *Umayal Achi v Lakshmi Achi*, (1945) FCR 1 : AIR 1945 FC 25.

14 Bombay Act, 1942 (17 of 1942). See *Soniram v Dwarkabai*, (1951) 53 Bom LR 325 : (1951) Bom 679 : AIR 1951 Bom 94; Central Province and Berar Act, 6 of 1942; Orissa Act, 5 of 1944; Assam Act, 13 of 1943; Uttar Pradesh Act, 11 of 1942. This enactment was made retrospective in its operation; *Kailash Chandra v Shri Devi*, AIR 1951 All 636. As to the application of the Madras Hindu Women's Rights to Property (Extension to Agricultural Lands) Act, 26 of 1947; *Bappu Ayyar v Ranganayaki*, (1955) 2 MLJ 302 : AIR 1955 Mad 394. Reference may be made to the following cases, which were governed by the Federal Court decision and did not fall within the purview of the Madras Hindu Women's Rights to Property. Extension to Agricultrural Lands Act, 26 of 1947; *Parappa v Nagamma*, (1954) Mad 183 : AIR 1954 Mad 576; *FBT Sarojini Devi v Shri Krishna*, (1945) Mad 61 : AIR 1944 Mad 401; *Dhanam v Varadarajan*, AIR 1953 Mad 176. Debt secured by mortgage of agricultural lands is 'property' under the Act and the widow is entitled to a share therein—*Subba Naicker v Nallammal*, AIR 1950 Mad 192. Reference may also be made to *Hari Dass v Hukmi*, AIR 1965 Punj 254; *Kashi Nath v Umapada*, AIR 1968 Cal 83.

15 *Dagdu v Namdeo*, (1954) Bom 1069 : 56 Bom LR 513 : AIR 1955 Bom 152.

16 *Shivappa v Yellawa*, (1953) Bom 958 : 55 Bom LR 658 : AIR 1954 Bom 47; *Shyamu v Vishwanath*, (1955) 57 Bom LR 807 (co-widows prejudicially affected); *Jana Gadi v Parvati Santosh*, (1958) 60 Bom LR 553.

17 *Shivappa v Yellawa*, (1953) Bom 958 : 55 Bom LR 658 : AIR 1954 Bom 47.

18 *Pannalal v Sitabai*, (1954) ILR Nag 30 : AIR 1953 Nag 70 (position of a Jain widow); *Parappa v Nagamma* (different modes of devolution); *Rathinasabapathy v Saraswathi*, AIR 1954 Mad 307 : (1953) MLJ 459.

19 *Ramaiya v Mottayya*, AIR 1951 Mad 954; *Chinniah Chettiar v Sivagami Achi*, AIR 1945 Mad 21; *Parappa v Nagamma*, AIR 1954 Mad 576 (FB). The effect of the Act was not to confer larger rights on the widow then those enjoyed by her deceased husband as a coparcener.

20 *Dagdu v Namdeo*, (1954) Bom 1069 : 56 Bom LR 513 : AIR 1955 Bom 152.

21 *Umayal Achi v Lakshmi Achi*, AIR 1945 FC 25 : (1945) FCR 1 : (1945) 1 MLJ 108; *Chandra Pal Singh v Bhagwati Devi*, (1979) All LJ 427.

The main features of the Act are:

(1) in the case of separate property:

(a) the widow along with the sons is entitled to the same share as the son;

(b) a pre-deceased son's widow inherits in like manner as the son, if there is no son surviving of such predeceased son; and in like manner as a son's son, if there is surviving a son or son's son of such pre-deceased son;

(c) the same provision applies *mutatis mutandis* to the widow of a pre-deceased son of a pre-deceased son;

(2) in the case of a *Mitakshara* joint family, the widow takes the place of her husband.

General effects of the Act.—The Act confers new rights on widows in modification of the previous law as laid down by the texts and interpreted by judicial decisions. The general effect of the Act is to put the three female heirs mentioned in sub-section (1) of section 3 on the same level as the male issue of the last owner along with the male issue or in default of them. Sub-section (1) deals with property over which a Hindu has a power of disposition by a testament. Such property, in the case of a Hindu governed by *Dayabhaga* School, is his separate property as well as ancestral property in his hands and his share in joint family property. Moreover, in case of a Hindu governed by *Mitakshara*, it means his separate property. Sub-section (2) of section 3 applies to his 'interest in joint family property' which, as pointed out later, would mean all other property in which he had, under *Mitakshara* law, interest at the time of his death. The Act puts the widow as a member of the joint family, in the place of her deceased husband and the husband's interest in the joint family property under *Mitakshara*, though undefined, vests immediately upon his death on the widow and does not devolve by survivorship. Section 2 provides that, notwithstanding any rule of Hindu law or custom to the contrary, the provisions of section 3 shall apply where a Hindu dies intestate. Therefore, wherever the provisions of section 3 apply, any other rule or custom of Hindu law that would otherwise have applied, ceased to govern the parties; then such rule or custom must be ignored as being superseded by the Act. Sub-section (4) of section 3 confers on the widow, the right of claiming partition of the joint family property, as any other coparcener is entitled to do under the general law.

The acquisition by the widow of the same interest as her deceased husband in the joint family property does not of itself disrupt *Mitakshara* joint family and the widow continues as before to be a member of the joint family. Her rights are augmented, but there is no immediate severance of the joint family.[22] Though her position in the joint family may in many respects be analogous to that of any undivided male coparcener in the joint family, it would be a misnomer to call her a coparcener. All the High Courts and the Supreme Court[23] are agreed that she does not by operation of the Act become a coparcener.[24] However, it would not be correct to describe her interest as inchoate or

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22 *Parappa v Nagamma*, (1954) Mad 183; AIR 1954 Mad 576; *Kamal Kishore v Harihar*, (1954) 30 Pat 357 : AIR 1951 Pat 645; *Gangadhar v Subhashini*, AIR 1955 Ori 135.

23 *Satrughan v Sabujpari*, AIR 1967 SC 272; *Lakshmi Perumallu v Krishnavenamma*, AIR 1965 SC 825.

24 *Parappa v Nagamma*, (1954) Mad 183 : AIR 1954 Mad 576; *Radha Ammal v IT Commissioner, Madras*, (1950) 1 MLJ 399 : AIR 1950 Mad 538; *Rathinasabapathy v Yellaw*, (1953) 2 MLJ 459 : AIR

(Footnote No. 24 Contd.)

imperfect, till she claims partition.[25] She becomes entitled to the undivided interest of her deceased husband and takes 'the same interest as her husband' and not 'the same right as her husband'.[26] Moreover, when the deceased has left a son, she becomes entitled to be in the same position as the son. She may or may not choose to demand partition. Therefore, where she does not enforce partition and the joint family continues as before without any severance of the joint status, the incidents of the coparcenary continue to apply to all the members including the widow, with this reservation that her existence suspends the rule of survivorship. Moreover, even then the rule of survivorship continues to operate *qua* the other coparceners; and their interest as also the interest of the widow is liable to fluctuation by births and deaths in the joint family, which continues as before, but subject to her statutory right.[27] Moreover, founded on the same principle is the view expressed by a Full Bench of the HighCourt of Madhya Pradesh, that the widow who has under sub-section (2) of section 3 obtained interest in her husband's estate and holds the estate with her minor (unmarried) son, takes upon the death of the son, the whole estate by survivorship.[28]

On the same principle, the rights and powers of the *karta* of the joint family to deal with, and to alienate for legal necessity, the coparcenary property including the widow's interest, and represent all the members of the joint family to the outside world continue as before.[29] The position of the *karta* remains unaffected as long as there is no partition and the position of the widow is somewhat analogous to that of a male coparcener in the family. The *karta*, though he is entitled to exercise his ordinary powers under the ordinary law, is not competent to make a gift of the property belonging to the family and the widow is entitled to challenge any unjustified alienation, if her interest is sought to be defeated.[30] Moreover, even where the joint family, after the death of her husband, consists of herself and a sole surviving coparcener, the latter cannot make a gift of the entire property because the widow's existence would prevent the vesting of all the coparcenary interest in him.[31] The widow has,

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(Footnote No. 24 Contd.)
1954 Mad 307; *Lakshmi Ammal v Ramachandra*, AIR 1960 Mad 568 : (1960) Mad 991; *Gangadhar v Subhashini*, AIR 1955 Ori 35; *Shankar v Gangaram*, (1952) Bom 485 : (1952) 54 Bom LR 75; *Ramsaran v Bhagwat*, AIR 1954 Pat 318; *Manicka v Arunachala*, AIR 1965 Mad 1 (FB).

25 *Sankara Rao v Rajyalakshamma*, AIR 1961 AP 241; *Chokalingam v Alamalu Ammal*, AIR 1982 Mad 29.

26 *Dagdu v Namdeo*, (1954) Bom 1069, 56 Bom LR 513 : AIR 1955 Bom 152. The Madras and Bombay High Courts have held that the widow not being a coparcener is not entitled to become the *Karta* of the family—*Radha Ammal v CIT, Madras*, AIR 1950 Mad 538; contra *CIT v Laxminarayan*, (1948) ILR Nag 775 : AIR 1949 Nag 128. In *Commissioner of IT v GS Mills*, AIR 1966 SC 24 the Supreme Court held that a widow cannot become the *karta* of the family.

27 *Seethamma v Veerana*, (1950) Mad 1076 : AIR 1950 Mad 785; *Kamalabala v Jivan Krishna*, (1941) 2 Cal 32 : 227 IC 291 : AIR 1946 Cal 461.

28 *Bhondu v Ramdayal*, AIR 1960 MP 51 (FB).

29 *Ahuja v Rameshwarlal*, AIR 1971 Raj 269; *Seethamma v Veerana*, AIR 1950 Mad 785; *Radha Ammal v IT Commissioner, Madras*, (1950) 1 MLJ 399 : AIR 1950 Mad 538 (she cannot ask for accounts); *Shivappa v Yellawa*, (1953) Bom 968 : 55 Bom LR 659 : AIR 1954 Bom 47; *Mahadu v Gajarabai*, AIR 1954 Bom 442 : (1954) Bom 885 : 56 Bom LR 387; *Parvathamma v Subhadramma*, AIR 1963 AP 236; *Fathamunnisa Begum v Rajagopalacharilu*, AIR 1977 AP 24; *Fatech Chand v Bhushan Prakash*, AIR 1957 All 801 (Suit by *karta* against third party).

30 *Shivappa v Yellawa*, AIR 1954 Bom 47 : (1953) Bom 958 : 55 Bom LR 659; *Ramaligam v Ramalakshmi*, AIR 1958 Mad 228 : (1958) Mad 7 : (1957) 2 Mad LJ 382; *Lakshmi Ammal v Ramachandra*, AIR 1960 Mad 568 : (1960) Mad 991 (dissenting from *Rathinasabapathi v Saraswathi*, AIR 1954 Mad 307); *Papayamma v Gopalakrishnamurthy*, AIR 1969 AP 341.

31 *Shivappa v Yellawa*, (1953) Bom 958 : 55 Bom LR 659 : AIR 1954 Bom 47; *Harekrishna v Jujesthi*, AIR 1956 Ori 73; *Ramsaran v Bhagwat*, AIR 1954 Pat 318; *Tukaram v Mathurbhai* AIR 1973 Bom 37.

during her lifetime, all the powers, which her husband had, save that her interest is limited to a widow's estate. She can alienate her widow's interest in her husband's share; she can even convey her interest in the same for necessity or other binding purposes. Thus when, under the Act, a widow succeeds as heir to her husband, the ownership in the properties both legal and beneficial vest in her. She represents the estate, the interest of the reversioners being only a *spes successionis*. She is entitled to the full beneficial enjoyment of the estate. She cannot however, alienate the property unless it is for legal necessity or for the benefit of the estate. The restriction on her powers is not for the benefit of the reversioners, but is an incident of the woman's estate known to Hindu law. In view of the above, when legal neccessity is evident, the alienation cannot be challenged by the reversioner on the ground that he is the sole owner. Such alienation is binding upon the reversioner.[32] She can ask for partition and separate possession of her husband's share. In case she asks for partition, her husband's interest would be worked out, having regard to the circumstances obtaining in the family on the date of partition. If she divides herself from the other members of the family during her lifetime, on her demise, the succession would be traced to her husband on the basis that the property was his separate property. If there is no severance, it would devolve by survivorship to other members of the joint Hindu family.[33]

Where property devolves on a widow and the property was the separate property of her husband, she takes in it the same share as a son. This is by inheritance under section 3(1). The interest that she acquires in a case where the husband was a member of a joint family does not devolve on her by survivorship. All the High Courts are agreed on this, but there was difference of opinion on the question whether she can be said to have acquired her interest in such property by inheritance, till the conflict was set at rest by the Supreme Court in *Lakshmi Perumallu v Krishnavenamma*.[34] The Supreme Court held that such interest is neither by survivorship nor by inheritance, but a special type of interest, which is the creation of statute.[35]

According to this view, it is not necessary for the widow to take out a succession certificate for enforcing any claim or right of the husband, which devolves on her under the Act.[36]

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32 *Narayan Govind Hegde v Kamalakara Shivaram Hedge*, (2001) 8 SCC 487 : AIR 2001 SC 3861. Also see *Jaisiri Sahu v Rajdevan Dubey*, AIR 1962 SC 83 *infra*.

33 *Parappa v Nagamma*, (1954) Mad 183 : AIR 1954 Mad 576 (FB); *Ramaswami v Lakshmamma*, AIR 1963 AP 199; *Rup Raut v Basudeo Raut*, AIR 1962 Pat 436.

34 *Lakshmi Perumallu v Krishnavenamma*, AIR 1965 SC 825.

35 *Jai Ragi v Deputy Director of Consolidation*, (1973) All LJ 670; *Jadaobai v Puranjal*, (1944) Nag 832, 219 IC 158 : AIR 1944 Nag 243; *Jugalkishore v Wardhasa*, (1955) ILR Nag 446 : AIR 1955 Nag 166; *Mt Rajendra Bati v Mungalal*, AIR 1953 Pat 129; *Siveshwar v Har Narain* (1944) 23 Pat 760 : AIR 1945 Pat 116; *Kedar Nath v Rada Shyam*, AIR 1953 Pat 81; *Sabujpari v Satrughan*, AIR 1958 Pat 405; *Bhagobai v Bhaiyalal*, AIR 1957 MP 29; *Saradambal v Subbaram*, (1942) Mad 630 : 201 IC 152 : AIR 1942 Mad 212; *Rathinasabapathy v Saraswati*, AIR 1954 Mad 307; *Natarajan v Perumal*, AIR 1943 Mad 246 : (1942) 2 MLJ 668 : 206 IC 356; *Shankar v Gangaram*, (1952) 54 Bom LR 75; *Napappa v Mukumbe*, (1951) Bom 442 : AIR 1951 Bom 308, 53 Bom LR 177; *ILT Development v Kotayya*, AIR 1955 AP 135; *Ratan Kumari v Sunder Lal*, AIR 1959 Cal 787; *Chhotki v Chandra Prakash*, AIR 1964 Raj 32; *Harekrishna v Jujeshi*, AIR 1956 Ori 73; *Gangadhar v Subhashini*, AIR 1955 Ori 35; *Keluni Devi v Jagabandhu Naik*, AIR 1958 Ori 47.

36 *Natarajan v Perumal*, (1942) MLJ 668 : 206 IC 356 : AIR 1943 Mad 246; *Gangadhar v Subhashini*, AIR 1955 Ori 35; *Rakhmabai v Gangaram*, (1952) 54 Bom LR 75; *ILT Development v Kotayya*, AIR 1955 Andh Pra 135; *Chhotki v Chandra Prakash*, AIR 1964 Raj 32. The contrary view was taken in *Jadaobai v Puranmal*, (1944) ILR Nag 832 : AIR 1944 Nag 243.

The interest of the widow arises not by inheritance, nor by survivorship, but by statutory substitution. Her interest in the property is the limited interest known as Hindu women's estate, but the Act gives her the same power to claim partition as a male owner has. A widow of a coparcener is invested by the Act with the same interest that her husband had at the time of his death in the property of the coparcenary. She is thereby introduced into the coparcenary, and between the surviving coparceners of the husband and the widow so introduced, there arises community of interest and unity of possession. However, the widow does not on that account become a coparcener. By reason of statutory substitution of her interest in the coparcenary property, in place of her husband, the right which the other coparceners had, under the Hindu law of *Mitakshara* School, of taking that interest by the rule of survivorship, remains suspended so long as that estate enures. If the widow after being introduced into the family to which her husband belonged, does not seek partition, on the termination of her estate, her interest will merge into the coparcenary property. However, if she claims partition, she is severed from the other members and her interest becomes a defined interest in the coparcenary property, and the right of the other coparceners to take that interest by survivorship will stand extinguished. If she dies after partition or her estate is otherwise determined, the interest in coparcenary property, which has vested in her, will devolve upon the heirs of her husband. To effect such partition, it is not necessary that there should have been actual division of interest by metes and bounds. Mere severance of status is enough.[37]

There is nothing in the Act to show that the widow takes in the joint family property, a defined and divided share, as if the husband had separated from the joint family at the time of his death. The Act vests in the widow immediately upon his death, the undefined and fluctuating interest in the joint family property, which he himself had till the moment of his death. She will, therefore, get a share of the joint family property as at the date of demand by her for partition or at the date of partition at the instance of any coparcener, as the case may be, and not a share of property as at the date of death of her husband.[38]

Under the law prior to the Act, the widow of a person governed by *Mitakshara* had only a right of maintenance in respect of coparcenary property in which the husband had interest. In respect of separate property left by her husband, she had only the right of maintenance when the husband has left a son, grandson or a great-grandson. She could inherit his separate property only in the absence of these immediate heirs. All this was changed and her rights were augmented as pointed out above. As to the effect of adoption by her, see *Rani Lachhmi Kunwar v Shiam Singh*.[39]

The Bombay High Court has taken the view that unchastity[40] of a widow would not operate as a bar to her right to inherit or acquire any interest in her husband's property under the Act. The Madras, Calcutta and Mysore High Courts hold the contrary

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37 *Satrughan v Sabujpari*, AIR 1967 SC 272; *Lakshmi Perumallu v Krishnavenamma*, AIR 1965 SC 825.

38 *Nagappa v Mukumbe*, AIR 1951 Bom 309; *Parappa v Nagamma*, (1954) Mad 183 (FB) : AIR 1954 Mad 576; *Bhondu v Ramdayal*, AIR 1960 MP 51. Reference may also be made to the cases on the point collected in the above-mentioned cases. As to presumption of death under section 108 of the Evidence Act, and the rule that there is no presumption in any such case as to the precise date of death, reference may be made to *R Gopala Pathar v Jayalakshmi Ammal*, AIR 1984 Mad 340.

39 *Rani Lachhmi Kunwar v Shiam Singh,* AIR 1949 All 786.

40 *Akoba Laxman v Sai Genu Laxman*, AIR 1941 Bom 204.

view.[41] As under prior law, so under the Act, a widow on remarriage forfeits her right to her deceased husband's property.[42]

Agricultural property.—As already pointed out, it was held by the Federal Court[43] that the word 'property' in section 3 does not include agricultural lands.[44] Legislation was thereafter passed in many provinces extending the operation of the Central Act to succession to agricultural lands, with the result that the three female heirs mentioned in the Act could also succeed to such lands.[45]

In the facts of a case, under this provision, as amended by the state legislature, extending the Act to include 'agricultural property,' the husband died in 1943, prior to the amendment coming into effect and therefore the wife could not get any interest in the property of the husband by virtue of the amendment in 1947, as she had remarried in 1945, before the state amendment came into force.[46]

'When a Hindu governed by Dayabhaga...dies intestate leaving any property' [Section 3(1)].—Sub-section (1) of section 3 speaks of 'any property'. The expression *prima facie* includes all forms or types of interest answering the description of 'property' in law. The property must be heritable property, in respect of which question of succession may legitimately arise. It has been held by the Supreme Court that *shebaitship* is property within the meaning of the Act.[47]

'When a Hindu governed by any other school...dies intestate leaving separate property' [Section 3(1)].—Speaking generally, the effect of the Act, so far as it relates to a person governed by *Mitakshara*, is to put the three female heirs—his widow, the widow of a predeceased son and the widow of a predeceased son of a predeceased son—mentioned in section 3, on the same level as the male issue of the last owner or in default of them.

The expression '*separate property*' in section 3(1) was interpreted by the Federal Court in *Umayal Achi v Lakshmi Achi*,[48] and it was held that it has been used in a

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41 *Ramaiyya v Motayya*, (1952) Mad 187 : AIR 1951 Mad 954 (FB); *Kanailal v Pannasashi*, AIR 1954 Cal 588; *Appa Saheb v Gurubasawwa*, AIR 1960 Mys 79.

42 *Manabai v Chandanbai*, (1954) ILR Nag 727 : AIR 1954 Nag 284.

43 *Re* the Hindu Women's Rights to Property Act of 1937 and the Hindu Women's Rights to Property Amendment Act of 1938 and *Re* a special reference under section 213 of the Government of India Act, 1935—(1941) FCR 72; *Anant Lal v Ram Adhar*, 17 Luck 720 : 198 IC 443 : AIR 1943 Ori 216. For Coorg, *PA Machiah v MB Ponnava*, AIR 1973 Mys 1.

44 Agricultural land has been held to include a mango grove—*Sarojini Devi v Subrahmanyam*, (1945) Mad 61 : AIR 1944 Mad 401.

45 Bombay Act, 1942 (17 of 1942). See *Soniram v Dwarkabai*, (1951) 53 Bom LR 325 : (1951) Bom 679 : AIR 1951 Bom 94, CP and Berar Act, 1942 (6 of 1942), Orissa Act, 1944 (5 of 1944), Assam Act, 1943 (13 of 1943), UP Act, 1942 (11 of 1942). This enactment was made retrospective in its operation—*Kailash Chandra v Shri Devi*, AIR 1951 All 636. As to the application of the Madras Hindu Women's Rights to Property (Extension to Agricultural Lands) Act, 26 of 1947, see *Bappu Ayyar v Ranganayaki*, (1955) 2 MLJ 302 : AIR 1955 Mad 394. Reference may be made to the following cases, which were governed by the Federal Court decision and did not fall within the purview of the Madras Hindu Women's Rights to Property (Extension to Agricultrural Lands) Act, 26 of 1947. *Parappa v Nagamma*, (1954) Mad 183 : AIR 1954 Mad 576; *FBT Sarojini Devi v Shri Krishna*, (1945) Mad 61 : AIR 1944 Mad 401; *Dhanam v Varadarajan*, AIR 1953 Mad 176. Debt secured by mortgage of agricultural lands is 'property' under the Act and the widow is entitled to a share therein—*Subba Naicker v Nallammal*, AIR 1950 Mad 192. Reference may also be made to *Hari Dass v Hukmi*, AIR 1965 Punj 254; *Kashi Nath v Umapada*, AIR 1968 Cal 83.

46 *Chinthamani Ammal v Nandgopal Gounder*, (2007) 4 SCC 163.

47 *Angurbala v Debarata*, (1951) SCR 1125 : (1952) 2 Cal 209 : AIR 1951 SC 293.

48 *Umayal Achi v Lakshmi Achi*, AIR 1945 FC 25 : (1945) 1 MLJ 108.

narrow and limited sense so as to exclude not merely the interest that the last owner may have had in the joint family property, but also to exclude from the operation of the sub-section, property acquired by him on partition and property which devolved on him as a sole surviving coparcener. That decision was quoted with approval by the Supreme Court in the decision referred to above. In *Manoharlal v Bhuribai*, the Supreme Court expressed the view that the property held by a sole coparcener in a family, does not become his 'separate property' so long as there is a woman in the family, who can bring in to existence a new coparcener by adoption.[49] There has been some divergence of judicial opinion as to the effect of the Federal Court decision.

Following that decision, it was held in the under-mentioned cases by the High Courts of Nagpur,[50] Patna[51] and Allahabad[52] that the share received by a father on partition between him and his son or sons, was not his 'separate property' and on his death, it was passed to the son or sons in preference to his widow. On the other hand, it has been held by the High Court of Orissa that in the case of a share obtained by a father on such partition, his widow is entitled to inherit the entire interest to the exclusion of the divided son.[53] The view was taken that in such a case, the property which fell to the share of the father was not his separate property, for the purpose of section 3(1), but was a joint family property within the meaning of section 3(2), and after the death of the father, his widow became entitled to that entire share to the exclusion of the divided son. In *Subramanian v Kalayanaram*, a case decided by the High Court of Madras, the view was taken that if the property, which a coparcener obtains at a family partition with his son, is not separate property within the meaning of section 3(1), it must be deemed to be an 'interest in Hindu joint family property' within the meaning of sub-section (2) of the section.[54] In another decision the same High Court has expressed its agreement with the view taken by the High Court of Orissa.[55] The High Court of Andhra Pradesh has held that the property received by a coparcener by virtue of a deed of settlement is not separate property.[56]

There seems little doubt that the expressions 'separate property' and 'interest in Hindu joint family property' are used in juxtaposition in sub-sections (1) and (2), the sub-sections which deal with all property left by such owner. The same conclusion was reached on the vexed question in a decision of a single judge of the Bombay High Court.[57] A Division Bench of that High Court has expressed agreement with that view and held that the property left by a Hindu male obtained at a partition between such male and other members of a family, where the partition was between a father and a son, or between a father and the other members of the family, is covered by sub-section (2).[58] The question whether in such a case, the widow is entitled exclusively to the property left by the husband or must share it equally with his divided son or sons, was not decided in the Madras and Bombay cases referred to immediately

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49 *Manoharlal v Bhuribai*, AIR 1972 SC 1369 : (1973) 3 SCC 432.
50 *Bhaoorao v Chandrabhagabai*, (1948) ILR Nag 465 : AIR 1949 Nag 108.
51 *Trisul v Daman*, AIR 1957 Pat 441; *Khatrani v Tapeshwari*, AIR 1964 Pat 261 (FB).
52 *Manbhari v Bishun*, AIR 1958 All 769; *Seshamma v Ramakoteswara*, AIR 1958 AP 280.
53 *Visalamma v Jagannadha Rao*, AIR 1955 Ori 160; *Pandab Panigrahi v Laxmi*, AIR 1979 Ori 64.
54 *Subramanian v Kalayanaram*, AIR 1957 Mad 456.
55 *Onnamalai v Seethapathi*, AIR 1961 Mad 90; *Commissioner of Income Tax v Thiagarajan*, AIR 1964 Mad 58. Reference may be made to *Venkatasubramania v Easwara Iyer*, AIR 1966 Mad 266.
56 *Lakshnamma v Kondayya*, AIR 1961 AP 505.
57 *Jana Gadi v Parvati Santosh*, (1958) 60 Bom LR 553.
58 *Parvati v Janabai*, AIR 1961 Bom 77.

above.[59] The Madhya Pradesh High Court[60] and the Madras High Court[61] have expressed their agreement with the view taken by the High Court of Orissa.[62]

'When a Hindu governed by Mitakshara dies having at the time of his death an interest in a Hindu joint family property' [Section 3(2)].—The effect of the rule laid down in this sub-section is to put the widow of a member of a joint family in the place of the deceased husband, and the husband's interest in the joint family property under *Mitakshara* vests in her immediately upon his death and does not devolve by survivorship.

The expression 'separate property' used in sub-section (1) and 'interest in a Hindu joint family property' used in this sub-section must be read in juxtaposition and that between them, the two sub-sections deal with all the properties left by such owner. All cases, therefore, where the last owner died leaving property other than his self-acquired property, must in view of the decision of the Federal Court,[63] it is submitted, fall under this section. In this context, it may be noted that the sub-section has adopted the Hindu conception that a widow is the surviving half of the deceased husband and introduced the *fictio juris* that she continues the legal persona of her husband. Of course, this does not mean that the husband is for all purposes to be deemed to be alive, till the widow claims partition or files a suit for working out her rights. No difficulty arises where the husband was at the time of his death, a member of a joint family and died leaving him surviving his widow and undivided coparceners. In any such case, if there was no son, the widow could immediately become entitled to the same interest in the property, which the husband himself would have taken on partition. When the husband died post 14 April 1937 in the absence of a son, grandson or great-grandson, the widow would succeed to the estate of her husband.[64] Moreover, if there was a son, who was a member of the joint family, the widow would be entitled to the same share as the son. Difficulty, however, arises where the husband held property, which was ancestral and was survived by the widow and a son or sons who had separated from him. Question arises whether in any such case, the widow is entitled exclusively to the property left by the husband or must share it equally with his divided son or sons.

The High Courts of Orissa[65] and Madras,[66] as already mentioned, have taken the view that in such a case, the widow is entitled to inherit the entire interest to the exclusion of the divided son or sons and the High Court of Bombay has left the question open. Serious difficulties have already arisen and, even though the law has been altered by the passing of the Hindu Succession Act, 1956, they will continue to arise particularly when rights of third parties, who are alienees of any property, are involved and questions of title have to be decided. These are some of the problems, which have arisen because of the extreme difficulty of fitting in any piecemeal legislation howsoever beneficial, in the integrated and complicated structure of Hindu law.

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59 *Subramanian v Kalayanaram, (supra)*; *Jana Gadi v Parvati Santosh*, (1958) 60 Bom LR 553.
60 *Jhangalu Shivacharan v Pancho Bai*, AIR 1968 MP 172.
61 *Onnamalai Ammal v Seethapathi*, AIR 1961 Mad 90; *Commissioner of Income-tax v Thiagarajan*, AIR 1964 Mad 58.
62 *Visalamma v Jagannadha Rao*, AIR 1955 Ori 160.
63 *Umayal Achi v Lakshmi Achi*, (1945) FCR 1 : AIR 1945 FC 25.
64 *Dinesh Jain v Lala Ram Brahmin*, AIR 2013 MP 85 (Mulla's Hindu Law 21st edition relied upon).
65 *Visalamma v Jagannadha Rao*, AIR 1955 Ori 160.
66 *Onnamalai Ammal v Seethapathi*, AIR 1961 Mad 90; *Commr of Income-tax v Thiagarajan*, AIR 1964 Mad 58.

Reference may be made to notes under section 14 of the Hindu Succession Act, 1956 for the effect of that section on the interest taken by a Hindu widow in the joint family property under this section.

Quantum of share on partition.—The quantum of interest to which a widow is entitled under this sub-section, is to be determined as on the date on which she seeks to enforce partition under sub-section (3).[67] The share, which devolves on a widow of a deceased coparcener, is not a fixed and determinate share, but what she takes is the 'same interest as he himself had'. Therefore, until there is partition, she cannot predicate the particular fraction of her share, for it is likely to increase or decrease by birth or death of other coparceners.[68] Her share would include a share in accretions to the joint family property till partition is effected.[69]

Prior to the Act, a widow was entitled to a share on partition among her sons, in her capacity as a mother (except in Madras). It has been held in a number of cases, that after the Act, the widow cannot claim a double share on partition between the sons, one in her capacity as a widow and another as a mother.[70] Under the prior law, *stridhana* acquired by a female from her husband or father-in-law was taken into account when a share was allotted to her on partition amongst the sons. The share she gets under section 3(2) is not affected by any rule of Hindu law to the contrary and it has been held in a Nagpur case that such *stridhana* received by her would not be deducted from her share on partition.[71]

'Limited interest known as a Hindu woman's estate...shall have the right of claiming partition' [Section 3(3)].—Sub-section (3) expressly declares that the interest devolving upon a widow under section 3 is a limited interest known as 'Hindu woman's estate'. This expression has been interpreted to mean Hindu widow's estate.[72]

On a plain reading of sub-sections (2) and (3), it is clear that the widow, on her husband's death in a joint family, gets the same interest that her husband had, with the limitation that the interest is not absolute but is limited in the manner of a Hindu widow's estate. It would not be correct to equate the interest which she gets with the share a widow used to get under the orthodox law at a partition between her sons.[73] It is also clear that having confined the interest devolving upon her to a widow's limited estate, the legislature was at pains to stress that nonetheless, she was to have the same right of partition as a male coparcener. It follows that all the incidents of a widow's estate should attach to the interest which devolves on her by virtue of the express statutory estate created in her favour with the added right to claim partitions as its outstanding feature. It has accordingly been held that she can alienate her interest in the coparcenary property for legal necessity;[74] and her interest is liable to be attached and sold in

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67 *Lakshmi Perumallu v Krishnavenamma*, AIR 1965 SC 825.

68 *Nagappa v Mukumbe*, (1951) Bom 442 : AIR 1951 Bom 309 : 53 Bom LR 442; *Shivappa v Yellawa*, (1953) Bom 958 : AIR 1954 Bom 47; *Gangadhar v Subhashini*, AIR 1955 Ori 135; *Tukaram v Gangi*, AIR 1957 Nag 28; *Ramchandra v Ramgopal*, AIR 1956 Nag 228 (crucial date for determining interest is when right to partition is exericised); *Suryanarayana v Sugunavathi*, AIR 1961 AP 939.

69 *Gangadhar v Subhashini*, AIR 1955 Ori 135.

70 *Shyamu v Vishwanath*, (1955) Bom 890 : 57 Bom LR 807 : AIR 1955 Bom 410; *T Sarojini Devi v Sri Krishna*, AIR 1944 Mad 401 : (1945) Mad 61; *Indu Bhusan v Mrityunjoy*, (1946) 1 Cal 128.

71 *Hanuman v Tulsabai*, AIR 1956 Nag 63.

72 *Dagadu v Namdeo*, (1954) Bom 1069 : 56 Bom LR 513 : AIR 1955 Bom 152.

73 *Bepin Behary v Lakshsona*, AIR 1959 Cal 27, p 30.

74 *Harekrishna v Jujesthi*, 1956 AIR Ori 73; *Prem Mahton v Bandhu Mahto*, AIR 1958 Pat 20.

execution of a decree obtained against her.[75] Although she cannot alienate the property without legal necessity, she can alienate her own restricted interest to enjoy the property during her lifetime. The alienee in such a case can enjoy the property during her lifetime and is also by virtue of that right entitled to claim partition.[76]

Prior to the enactment, a widow-mother could not herself claim partition unless the sons chose to effect severance of the joint status. In Madras, no female heirs got a share on such partition and in Bengal, a sonless stepmother did not have the right to claim a share on a partition among the sons of her deceased husband. This sub-section has the effect of putting the widow in the same position as a son in the matter of claiming partition.

The right to claim partition given to a widow under this sub-section does not negate her right to claim maintenance. It is only an enabling right and she may ask for maintenance instead of partition.[77] However, she cannot enforce both the rights simultaneously.[78] The share she gets on partition, it has been held, is in lieu of maintenance and if she can get a share in all the coparcenary property including agricultural lands, her right to maintenance would cease.[79] The right of claiming partition conferred upon a widow under the Act is personal to her. The right being personal, would come to an end on her death, if no partition had taken place.[80] Reference is invited to a decision of the Supreme Court under the Estate Duty Act, where this issue was decided.[81] When the widow did not seek partition of her share, it would merge with the coparcenery property and such widow's daughter's claim in such share would not be tenable, since the widow had herself not sought a partition during her lifetime.[82] It has been held in a number of cases that if she died pending a suit for partition, her undivided interest would devolve by survivorship and would not go to her husband's heirs as reversioners.[83] An alienee of the widow's interest for legal necessity can, however, claim the right to partition of the joint family property even after her death.

Husband's death pendente lite.—In view of the peculiar status created for the widow under the Act, entitling her to claim partition in her own right, the sons cannot represent her interest. Therefore, where a husband dies pending a suit or appeal, his widow must be substituted as a party in his place. Otherwise, the suit or appeal

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75 *Thimmi Ammal v Venkatarama*, AIR 1960 Mad 347.

76 *Dagadu v Namdeo*, (1954) Bom 1069 : 56 Bom LR 513 : AIR 1955 Bom 152; *Prem Mahton v Bandhu Mahto*, AIR 1958 Pat 20; *Suryanarayana v Sugunavathi*, AIR 1961 AP 393; *Mahipat Missirv Ganpat Sah*, AIR 1963 Pat 277; *Kunja Sahu v Bhagabon*, AIR 1951 Ori 35; *Bhagabat Prasad v Haimabati Devi*, AIR 1990 Ori 70.

77 *Rathinasabapathy v Saraswathi*, AIR 1954 Mad 307 : (1953) 2 Mad LJ 459; *Gajavalli Ammal v Narayanaswami*, AIR 1962 Mad 187; *Varahalamma v Ammathalli*, AIR 1959 AP 590.

78 The position was different when she could not get a share of agricultural lands—*Parappa v Nagamma*, (1954) ILR Mad 183 : AIR 1954 Mad 576.

79 *Shyamu v Vishwanath*, (1955) ILR Bom 890 : AIR 1955 Bom 410; *T Sarojini Devi v Sri Krishna*, (1945) Mad 61 : AIR 1944 Mad 401.

80 *Alamelu Ammal v Chellammal*, AIR 1959 Mad 100 (FB) : (1959) Mad 106.

81 *Controller of Estate Duty, Madras v Alladi Kuppuswamy*, AIR 1977 SC 2069 : (1977) 3 SCC 3859.

82 *B K Babu v Smt. A. Jaya Lakshmi*, AIR 2008 A.P. 78 : (2008) 2 ALD 411.

83 *Shyamu v Vishwanath*, AIR 1955 Bom 410; *Subba Rao v Krishna Prasadam*, (1954) Mad 227 : AIR 1954 Mad 227; *Kachra Khan v Khant Ram*, AIR 1953 Sau 175; *Shankar v Gangaram*, (1952) Bom LR 75; *Nagappa v Mukambe*, (1951) Bom 442 : 53 Bom LR 117 : AIR 1951 Bom 309.

would abate.[84] Where a coparcener dies, pending a suit brought against the individual members of the joint family and not in a representative capacity, the interest of the deceased coparcener cannot be represented by the other members and his widow must be brought on record.[85] Where a coparcener brings a suit of partition and dies *pendente lite*, his widow can continue the suit as representing her husband.[86]

Interest liable to attachment and sale in execution.—The interest devolving on a widow under section 3(2) is liable to attachment and sale in execution of a decree obtained against her.[87] Where a creditor has obtained a decree against a coparcener in his lifetime, he can execute it against the interest devolving on the widow. The rule of survivorship, which operates in case of the death of a widow, who dies before there is any partition of the joint family property, does not have the effect of defeating the rights of any creditor of the deceased coparcener. The creditor can proceed against the interest, which devolved on the widow for satisfaction of such liability.[88]

Devolution of interest on the death of the widow.—The Act is silent as to what is to be the devolution of the interest of the widow upon her death. The separate property of her husband inherited by her would, it is clear, devolves upon her husband's heirs as reversioners. Moreover, in the case of joint family property, it would seem, having regard to the provisions of section 3 and the scheme and object of the Act, that if she dies without any partition having taken place, her interest in the property would pass by survivorship to the coparceners, though, the decisions on the subject cannot be said to be quite uniform. It would also seem that if she sought partition and divided herself from the joint family, the property taken by her would, on her death, pass to her husband's heirs as reversioners. Prior to the decision of the Supreme Court, there were conflicting decisions of various High Courts on the point.

The High Court of Madhya Bharat has taken the view that the interest taken by the widow is like the interest of her husband, an undivided interest in the joint family property, and even though she is entitled to file a suit for partition, the interest does not get separated, at any rate until the suit for partition is filed by her.[89] The High Court of Orissa has held that the interest of the widow, succeeding to her husband's interest in coparcenary property, goes to the heirs of her husband after her, in the absence of any coparcener living at the time of her death.[90] A Full Bench of the Madras High Court[91] has held that if the widow divided herself from the other members of the family during her lifetime, on her demise, the succession would be traced to her husband on the basis that the property was his separate property. If there was no severance, it would devolve by survivorship to other members of the joint family. A Full Bench of the Patna High Court has also taken the same view.[92] A Full Bench of the Bombay High

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84 *Dhanukha v Saudagar*, (1955) 32 Pat 1003 : AIR 1955 Pat 240; *Sariu Singh v Ramsaroop*, AIR 1955 Pat 155; *Jugal Kighore v Wardhasa*, AIR 1955 Nag 166; *Ramnath Ramgopal*, AIR 1951 Nag 434; *Shivrajsingh v Gaurishanka*, AIR 1961 MP 147.

85 *Awadh Behari v Jhaman Mahton*, AIR 1953 Pat 324.

86 *Shankar v Gangaram*, (1952) Bom 485 : 54 Bom LR 75 : AIR 1952 Bom 127.

87 *Thimi Ammal v Venkatarama*, AIR 1960 Mad 347.

88 *Saradambal v Subbarama Ayyar*, (1941) 2 MLJ 287 : 201 IC 301 : AIR 1942 Mad 272; *Siveshwar v Har Narain*, (1944) 23 Pat 760 : 219 IC 405 : AIR 1945 Pat 116; *Co-op Society of Patur v Vasant*, AIR 1946 Nag 317; *Shankar v Gangaram*, (1952) Bom 485 : 54 Bom LR 75 : AIR 1952 Bom 127.

89 *Laxman v Gangabai*, AIR 1955 MB 138.

90 *Harekrisna v Jujesthi*, AIR 1956 Ori 73; *Keluni Devi v Jagadambhu Naik*, AIR 1956 Ori 47.

91 *Parappa v Nagamma*, (1954) Mad 183 : AIR 1954 Mad 576 (FB).

92 *Khatrani v Tapeshwari*, AIR 1964 Pat 261 (FB).

Court also took the same view in *Ranu Thaku v Santu Goga.*[93] This view was dissented from in a decision of the Madhya Pradesh High Court, where it was held that on the death of a widow who has taken on partition her husband's share, there is a reversion of the property to the coparcenary.[94]

The Supreme Court has finally held that if the widow in such a case died after partition of her estate, the interest in the coparcenary property, which has vested in her, will devolve upon the heirs of the husband.[95]

Upon the death of a widow governed by *Dayabhaga* law, the share which she inherited from her husband under section 3 of the Act devolves on the husband's heirs under the Hindu law as modified by the Act, as if he died simultaneously with her. Similarly, the share which the widow of a predeceased son gets under the Act, devolves after her death upon the heirs of her father-in-law.[96]

Reference may be made to the notes under section 14 of the Hindu Succession Act, 1956, for the effect of that section on the interest taken by a Hindu widow under this section.

Nothing in this Act shall apply to the property of a Hindu dying intestate before the commencement of this Act [Section 4].—The Act did not have any retrospective effect. Where, therefore a Hindu male having any interest in a coparcenery died before the commencement of the Act, his widow would not be entitled to claim under the Act.[97]

Attention is also invited to the decision of the Supreme Court[98] in the context of section 4 of that Act where, while construing various provisions of that Act, the Court has held that succession to a Hindu male dying intestate will vest upon the widow under section 4(1)(ii) to the exclusion of the daughters who are mentioned in a subsequent clause i.e. clause (iii) by virtue of use of the expression "in the following order".

§ 35A. Hindu Law Women's Rights Act, 1933 (Mysore Act 10 of 1933).—Reference may be made to *Nagendra Prasad v Kempananjamma.*[99]

§ 36. Propinquity, the governing factor.—Under *Mitakshara*, the right to inherit arises from propinquity, that is, proximity of relationship.[100] Under *Dayabhaga*, it

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93 *Ranu Thaku v Santu Goga,* AIR 1968 Bom 1 (FB); *Manda v Pandurang*, AIR 1968 Bom 340 (remarriage of widow after partition).

94 *Bhagobai v Bhaiyalal*, AIR 1957 MP 29.

95 *Satrughan v Sabujpari*, AIR 1967 SC 272.

96 *Kamalabala v Jiban*, (1946) 2 Cal 32 : AIR 1946 Cal 461; *Provash Chandra v Prokash Chandra*, (1946) 2 Cal 164.

97 *Muneshwari Devi v Birendra Mahto,* AIR 2013 Pat 53 (case of husband dying prior to 1937, hence Act held not applicable and his widow held not entitled); *Ram Vishal v Jagannath,* (2004) 9 SCC 302; *Bhagiratbai Chandrabhan Nimbarte v Tanabai,* AIR 2013 Bom 99.

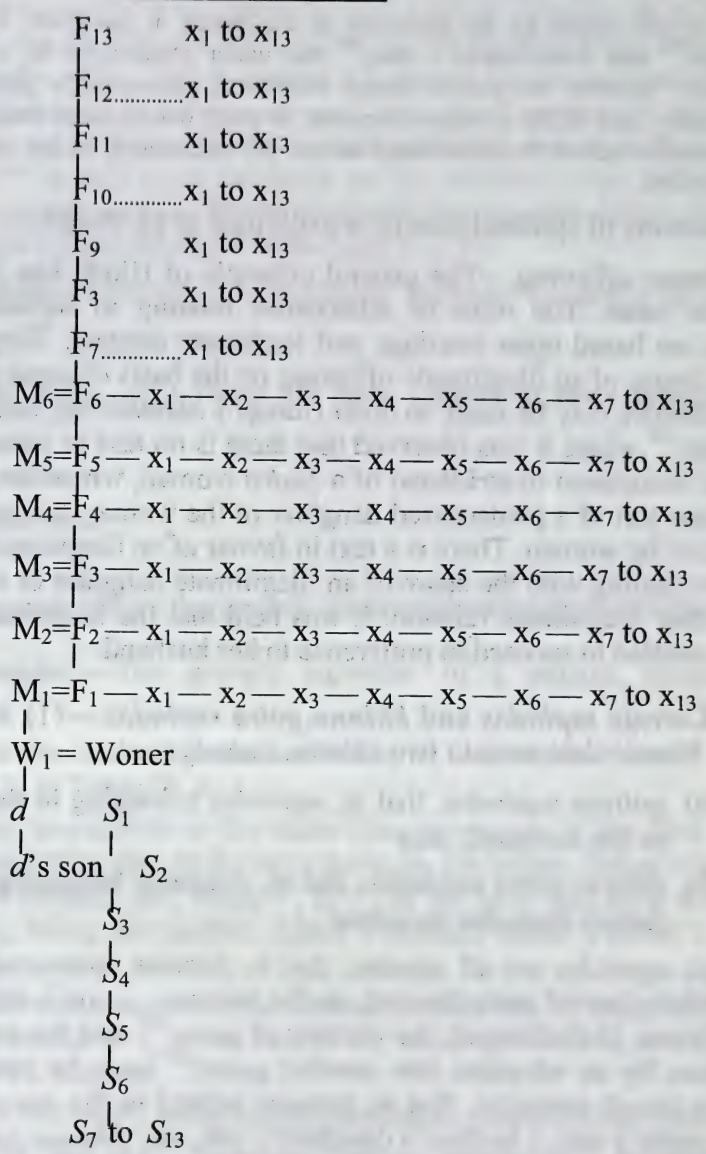
98 *L. Gowramma v Sunanda* , AIR 2016 SC 352 : 2016 (1) SCALE 285.

99 *Nagendra Prasad v Kempananjamma,* AIR 1968 SC 209; *Shankaramma v Madappa*, AIR 1977 Kant 188.

100 *Lallubhai v Cassibai*, (1881) 5 Bom 110, 121 : 7 IA 212, 234; *Adit Narayan v Mahabir Prasad*, (1921) 48 IA 86, 95 : 6 Pat LJ 140 : 60 IC 251 : AIR 1921 PC 53; *Vedachela v Subramania*, (1921) 18 IA 349, 354 : 44 Mad 753 : 64 IC 402 : AIR 1922 PC 33; *Parot Bapalal v Mehta Harilal*, (1895) 19 Bom 631; *Babu Lal v Nanku Ram*, (1895) 22 Cal 339; *Suba Singh v Sarafraz*, (1897) 19 All 215 (FB); *Subramanya v Siva Subramanya*, (1894) 17 Mad 316; *Appandai v Bagubai*, (1910) 33 Mad 439, 444 : 5 IC 280; *Chinnasami v Kunju Pillai*, (1923) 35 Mad 152; *Pichandi v E Ramaswami*, AIR 1971 Mad 204 (father's father's son's son's daughter's son and second husband's son of mother of the *propositus*—latter preferred).

arises from spiritual efficacy, that is, the capacity for conferring spiritual benefit on the manes of paternal and maternal ancestors (section 79).

Table IV.1



Note.—For explanation of the table, see **§ 41.**

Though under *Mitakshara*, the right to inherit does not arise from the right to offer oblation, the test to be applied, when a question of preference arises in the case of *sagotra sapindas*, is the capacity to offer oblation,[101] but, in the case of *bhinnagotra sapindas*, 'primary test' is 'propinquity in blood'[102] and, 'when the degree of blood

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101 *Bhyah Ram Singh v Bhyah Ugur Singh*, (1872) 13 MIA 373, 392; *Buddha Singh v Laltu Singh*, (1915) 42 IA 208, pp 217, 227, 228, 37 All 604, pp 613, 623, 624 : 30 IC 5 : AIR 1915 PC 70.

102 *Balasurbrahmanya Pandva Thalaivar v Subbayya Tevar*, (1938) 65 IA 93 : (1938) Mad 551 : 40 Bom LR 704 : 172 IC 724 : AIR 1938 PC 34.

relationship furnishes no certain guide,' the test is the capacity for conferring spiritual benefit.[103]

Different meaning of sapinda in Mitakshara and Dayabhaga.—In *Buddha Singh v Laltu Singh*,[104] the Lordships of the Privy Council said:

> It is well settled by the decisions of the Board in *Lallubhai Bappoobhoy v Cassibai*[105] and *Ramchandra*'s case,[106] that under *Mitakshara* the *sapinda* relationship arises 'between two people though their being connected by particles of one body,' namely, that of the common ancestor, in other words, from community of blood in contradistinction to *Dayabhaga* notion of 'community in the offering of religious oblation'.

The doctrine of spiritual benefit is explained in §§ 79–87.

Illegitimate offspring.—The general principle of Hindu law is to limit heirship to a legitimate issue. The rules of inheritance relating to *sapindas*, *samanodakas* and *bandhus* are based upon marriage and legitimate descent. They can only be departed from in favour of an illegitimate offspring on the basis of some well-established principles. Reference may be made to *Sadu Ganaji v Shankerrao*, decided by the High Court of Nagpur,[107] where it was observed that there is no text or statutory provision to cover a case of succession to *stridhana* of a *Sudra* woman, where the question is whether an illegitimate son of a predeceased daughter of the woman succeeds in preference to the husband of the woman. There is a text in favour of an illegitimate son of a *Sudra*. There is no text dealing with the share of an illegitimate daughter or an illegitimate grandson or any other illegitimate relation. It was held that the illegitimate son of the daughter was not entitled to succeed in preference to her husband.

§ 37. *Gotraja sapindas* and *bhinna-gotra sapindas*.—(1) *Mitakshara* divides *sapindas* of blood relations into two classes, namely:

(a) *gotraja sapindas*, that is, *sapindas* belonging to the same *gotra* or family as the deceased; and

(b) *bhinna gotra sapindas*, that is, *sapindas* belonging to a different *gotra* or family from the deceased.

Gotraja sapindas are all agnates, that is, persons connected with the deceased by an unbroken line of male descent, as for instance, a son's son, a son's son's son or brother's son. If challenged, the identity of *gotra*[108] and the continuity of the lineage, not broken by an adoption into another *gotra*[109] must be established. *Bhinna gotra sapindas* are all cognates, that is, persons related to the deceased through a female, such as sister's son, a brother's daughter's son, etc. *Bhinna gotra sapindas* are called *bandhus* in *Mitakshara*, and are commonly known by that name.

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103 *Vedachela v Subramana*, (1921) 48 IA 349 : 41 Mad 753 : 64 IC 402 : AIR 1922 PC 33; *Jatindranath Ray v Nagendranath Ray*, (1931) 58 IA 72 : 59 Cal 576 : 135 IC 637 : AIR 1931 PC 268; *Ademma v Hanuma Reddi*, (1938) Mad 260 : AIR 1937 Mad 967.

104 *Buddha Singh v Laltu Singh*, (1915) 42 IA 208, p 217 : 37 All 604, p 613 : 30 IC 529 : AIR 1915 PC 70.

105 *Lallubhai Bappoobhoy v Cassibai*, (1880) 5 Bom 110, p 121 : 7 IA 212, p 234.

106 *Ramchandra v Vinayak*, (1914) 41 IA 290, p 298 : 42 Cal 384, p 404 : 25 IC 290 : AIR 1914 PC 1.

107 *Sadu Ganaji v Shankerrao*, AIR 1955 Nag 84.

108 *Jadunath Kuar v Bisheshar Bakhsh Singh*, (1932) 59 IA 173 : 36 CWN 1073 : 136 IC 747 : AIR 1932 PC 142.

109 *Lal Hari Har Pratap Baksh Singh v Raja Bajrang Bahadur Singh*, (1938) 9 Luck 121 : 144 IC 529 : AIR 1933 Ori 197.

(2) *Gotraja sapindas* are sub-divided into two classes, namely: (a) *sapindas* technically so called; and (b) *samanodakas*.

It will be seen from the above that the word '*sapinda*' is used in *Mitakshara* in two senses. In its larger sense, it means a person having the same *pinda* or community of particles of the same body with the deceased, that is, a blood relation. In its narrower sense, the *sapindaship* ceases with the fifth degree on the mother's side and the seventh degree on the father's side. That is, a person is said to be the *sapinda* of another if, when he is related through his father, not more than seven degrees from the common ancestor, and when related through the mother, not more than five degrees from the common ancestor.[110] In this sense, as there are no females in the pedigree of a *gotraja sapinda*, the *sapindas* include blood relation to the seventh degree only reckoned from, and inclusive of, the deceased as defined in § 39.

In the following sections of this chapter, the word '*sapinda*' is used in its narrower sense.

§ 38. The classes of heirs.—(1) There are three classes of heirs recognised by *Mitakshara*, namely:

(a) *gotraja sapindas;*

(b) *samanodakas; and*

(c) *bandhus.*

(2) The first class succeeds before the second, the second succeeds before the third.

§ 39. *Gotraja sapindas.*—The *gotraja sapindas* of a person, according to *Mitakshara*, are:[111]

(i) His six male descendants in the male line; ie, his son, son's son's son, etc. being S_1 to S_6 in Table IV.1.

(ii) His six male ascendants in the male line, the wives of the first three of them, and probably also of the next three; ie, his father, father's father, father's father's father, etc, being F_1 to F_6 in the table and their wives, that is M_1 to M_6, being the mother, father's mother, father's father's mother, etc.

(iii) The six male descendants in the collateral male line of each of his male ascendants; i.e., x_1 to x_6 in the line of F_1, being his brother, brother's son, brother's son's son, etc;

x_1 to x_6 in the line of F_2, being his paternal uncle, paternal uncle's son, etc;

x_1 to x_6 in the line of F_3, being his paternal grand-uncle, paternal grand-uncle's son, etc.;

x_1 to x_6 in the line of F_4;

x_1 to x_6 in the line of F_5; and

x_1 to x_6 in the line of F_6.

(iv) His wife, daughter, and daughter's son.

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110 *Mitakshara*, Chapter III, Volume 53, quoted in *Ramchandra v Vinayak*, (1914) 41 IA 290 : 42 Cal 384, p 408 : 25 IC 290 : AIR 1914 PC 1.

111 *Sarkar's Hindu Law*, 7th edition, p 97; *Sarvadhikari's Principles of Hindu Law of Inheritance*, 2nd edition, p 530; *Bhyah Ram v Bhyaj Ugur*, (1870) 13 MLA 373, 373, p 394; *Rohan Kumar v Lachhman*, AIR 1976 Pat 287.

The *sapindas* are 57 in number as shown below:

S_1 to S_6	6
F_1 to F_6 and their wives M_1 to M_6	12
x_1 to x_6 in each of the six lines from F_1 to F_6	36
wife, daughter and daughter's son.	3
	57

It will be seen that the *sapinda* relationship extends to seven degrees reckoned from and inclusive of the deceased, this being the Hindu mode of counting degrees. It is six degrees, if you exclude the deceased. The wife becomes a *sapinda* of the husband on marriage. The daughter's son is not a *gotraja sapinda*, he is a *bandhu*, for he is related to the deceased through a female. For the purpose of succession, however, he is ranked with *gotraja sapindas*.

A *sapinda*, according to *Mitakshara*, means a persons connected with the same *pinda* or body. (see § 36).

In the case of the sons of a prostitute, there can be no *gotraja sapinda* relationship between them or their agnate male descendants as the father is unknown.[112]

§ 40. *Samanodakas*.—The *sapinda* relationship, as stated above, extends to seven degrees reckoned from and inclusive of the deceased. The *samanodakas* of a person include all his agnates from the 8th–14th degree.[113]

The *samanodakas* are shown in the Table IV.1. They are 147 in number up the 14th degree only; they are:

S_7 to S_{13} in the descending line	7
F_7 to F_{13} in the ascending line	7
x_7 to x_{13} in each of six collateral lines from F_1 to F_6, $7 \times 6 =$	42
x_1 to x_{13} in each of the 7 collateral lines F_7 to F_{13}, $13 \times 7 =$	91
	147

Samanodakas are those male relations of a Hindu to whom he offers oblations of water while performing the *shraddha* ceremony (see § 80).

§ 41. Table of *Gotraja sapindas* and *Samanodakas*.—Table IV.1 is a table of *gotraja sapindas* and *samanodakas*.[114]

The thick black lines show where the *sapinda* relationship ends, and the *samanodaka* relationship begins.

The *samanodakas* are shown in thick black type; the rest are *sapindas*.

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112 *Krishna Mudaliar v Marimuthu Mudaliar*, (1940) Mad 109 : AIR 1939 Mad 862 : (1939) 2 MLJ 423.

113 *Atmaram v Baitrao*, (1935) 62 IA 139 : 155 IC 330 : AIR 1935 PC 57 approving *Naraini v Chandi*, (1887) 9 All 467; *Rama Row v Kutiya*, (1917) 40 Mad 654, p 659 : 34 IC 294 : AIR 1917 Mad 871 and disapproving *Devkore v Amritram*, (1885) 10 Bom 372; *Ram Baran v Kamla Prasad*, (1910) 32 All 594 : 6 IC 698.

114 This table is an enlargement of the table given in *Sarvadhikari's Principles of the Hindu Law of Inheritance*, 2nd edition, p 527.

W is the widow of the deceased owner, *d* is his daughter and *d*'s son is his daughter's son.

S_1 to S_{13} are the son, the son's son, the son's son's son, etc, of the deceased.

F_1 to F_{13} are his father, father's father, father's father's father etc.

M_1 to M_6 are his mother, father's mother, father's father's mother etc.

x_1 to x_{13} in the line of F_1 are his brother, brother's son, brother's son's son, etc.

x_1 to x_{13} in the line of F_2 are his paternal uncle, paternal uncle's son, paternal uncle's son's son, etc.

x_1 to x_{13} in the line of F_3 are his paternal grand-uncle, paternal grand-uncle's son, etc and so on in the remaining lines from F_4 to F_{13}.

The table does not include female heirs recognised in the Bombay state.

F_1 to F_{13} is the ascending line; S_1 to S_{13} is the descending line; x_1 to x_{13} are the 13 collateral lines.

§ 42. Succession in the Bombay State.—The rules of inheritance in force in the Bombay state differ in some respect from those in force in the Benares, Mithila and Madras schools. Again, in those parts of the Bombay state, where the *Mayukha* is the prevailing authority, that is, the island of Bombay, Gujarat and the North Konkan, the rules of inheritance are in some respects different from those prevailing in other parts of the state. The order of succession in the Bombay state is given separately in Chapter VI (§§ 71–77).

§ 43. Order of succession among *sapindas*.—The *sapindas* succeed in the following order:

(1–3) Son, grandson (son's son) and great-grandson (son's son's son), and (after 14 April 1937) widow, predeceased son's widow, and predeceased son's predeceased son's widow.—A son, a grandson whose father is dead, and a great-grandson whose father and grandfather are both dead, succeed simultaneously as single heir to the separate or self-acquired property of the deceased with rights of survivorship.[115]

After 14 April 1937, a widow takes the same share as a son. The widow of a predeceased son inherits in like manner as a son, if there is no son surviving of such predeceased son; and in like manner as a son's son, if there is surviving a son or son's son of such predeceased son. The same rule applies *mutatis mutandis* to the widow of a predeceased son of a predeceased son.

(i) Take Per Stirpes.—The son, grandson and great-grandson take *per stirpes* and not *per capita* (see § 29 and illustration thereto).

(ii) Son Born After Partition.—Where there has been a partition between a father and his sons, and a son is subsequently born to him, such son takes not only the share of the father in the joint property obtained by him on partition, but the whole of the property acquired by the father before or after partition to the exclusion of the divided son.[116] *A* and his two sons, *B* and *C*, constitute together a joint family. *B* and *C*

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115 See § 31, illustration (a) and § 32. *Marudayi v Doraisami*, (1907) 30 Mad 348; *Gangadhar v Ibrahim*, (1923) 47 Bom 556 : 72 IC 307 : AIR 1923 Bom 265.

116 *Nawal Singh v Bhagwan Singh*, (1882) 4 All 427, p 429.

separate from *A*. After the division, a son *D* is born to *A*. *A* and *D* remain joint. *A* then dies leaving *D*. *D* is entitled not only to *A*'s separated share of the joint property, but also to the whole of *A*'s self-acquired property (see § 309).

(iii) Divided and Undivided.—Where there are sons by different wives, it often happens that the sons by one wife take their share of the joint property from the father and separate from him, and the father continues joint with the sons by his other wife. Suppose now that the father dies leaving self-acquired property, some acquired before and some after partition, who is entitled to the property? According to a Full Bench decision of the Allahabad High Court,[117] and rulings of other High Courts,[118] the undivided sons and their branches succeed to the whole of such property to the exclusion of the divided sons and their branches (see §§ 31 and 223).

(iv) Adopted Son.—Adoption confers upon the adoptee the same rights and privileges in the family of the adopter as the legitimate son, subject to certain qualifications (see §§ 494 and 497). In Andhra, an *illatom* son-in-law is a boy incorporated in the family with a view to give the daughter in marriage and is customarily recognised as an heir in absence of a natural born son.[119]

(v) Illegitimate Sons.—The illegitimate sons of a *Brahman*, *Kshatriya* or *Vaisya* are entitled to maintenance and not to any share of the inheritance.[120]

The illegitimate son of a *Sudra*, however, is entitled to a share of the inheritance provided: (l) he is the son (*putra*) of a *dasi*, that is, a Hindu concubine in the continuous and exclusive keeping of his father at the time of his birth;[121] and (2) he is not the fruit of an adulterous or incestuous intercourse.[122] It is not necessary that his mother should remain a permanent concubine till the day of his father's death.[123] A *Brahmin* mistress of a *Sudra* does not become a *Sudra* herself and their son is not

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117 *Ram Dei v Gyarsi*, 1949 All 160 (FB).

118 *Fakirappa v Yellappa*, (1898) 22 Bom 101; *Nana v Ramchandra*, (1909) 32 Mad 377 : 2 IC 510; *Viravan v Srinivasachariar*, (1921) 44 Mad 499, pp 503–04 : 64 IC 944 : AIR 1921 Mad 168 (FB); *Narasimham v Narasimham*, (1932) 55 Mad 577 : 137 IC 765 : AIR 1932 Mad 361; *Badri Nath v Hardeo*, (1930) 5 Luck 649 : 123 IC 861 : AIR 1930 Ori 77. (The case of *Kunwar Bahadur v Madho Prasad*, (1918) 17 All LJ 151 : 49 IC 620 : AIR 1919 All 223, relied upon in *Badri Nath*'s case does not support the decision in that case); *Ambika v Jamuna Prasad*, (1942) 17 Luck 72; *Satruhan Prasad v Sudip Narain*, AIR 1955 Pat 408 : (1955) ILR Pat 298; *Vishweshwarlal v Bhuramal*, AIR 1968 Raj 277; *Inder Narayan v Rup Narayan*, AIR 1965 MP 107; *Girdharilal v Fatehchand*, AIR 1955 MB 148.

119 *P Lakshmi Reddy v L Lakshmi Reddy*, AIR 1957 SC 314; *P Venkateswarlu v Raghavulu*, AIR 1957 AP 604.

120 See *Mitakshara*, Chapter I, section 12, *Volume* 3. *Roshan Singh v Balwant Singh*, (1902) 22 All 191 : 27 IA 51; *Chuoturya v Sahub Purhulad*, (1857) 7 MIA 18; *Hiralal Laxmandas v Meghraj Bhickchand*, (1938) Bom 779 : AIR 1958 Bom 433; *Mothey Anja Ratna v Narayana Rao*, (1952) SCJ 507, (1952) 2 MLJ 342 : AIR 1953 SC 433 (factors to be considered in fixing maintenance).

121 *Lingappa v Esudasan*, (1904) 27 Mad 13 (a Christian woman is not a *dasi*); *Sitaram v Ganpat*, (1923) 25 Bom LR 429 : 73 IC 412 : AIR 1923 Bom 384 (a Mohammedan woman is not a *dasi*); *Mahabir Prasad v Raj Bahadur Singh*, (1943) 18 Luck 585 (Thakur woman).

122 *Rahi v Govind*, (1876) 1 Bom 97; *Sadu v Baiza*, (1880) 4 Bom 37; *Gangabai v Bandu*, (1916) 40 Bom 369 : 32 IC 986 : AIR 1916 Bom 283; *Ram Kali v Jamma*, (1908) 30 All 508; *Rajani Nath Das v Nitai Chandra Dei*, (1921) 48 Cal 643 : 63 IC 50 : AIR 1921 Cal 820 (FB) overruling *Narain v Rakhal*, (1876) 1 Cal 1; *Kirpal v Sukurmoni*, (1882) 19 Cal 91 and *Ram Saran v Tek Chand*, (1901) 28 Cal 194. See *Bai Nagubai v Bai Monghibai*, (1926) 52 IA 153 : 50 Bom 604 : 96 IC 20 : AIR 1926 PC 73 (on appeal from (1923) 47 Bom 401 : 69 IC 291 : AIR 1923 Bom 190); *Manickchand v Bhagwandas*, AIR 1964 Bom 353; *Shibu v Pandu*, AIR 1967 J&K 81. The illegitimate son of a *Sudra*, who is the offspring of an adulterous or incestuous intercourse is entitled to maintenance only (§ 551). Reference may also be made to *Gopala Rao v Sitharamamma*, AIR 1965 SC 1970.

123 *Uderam v Thagga*, (1949) ILR Nag 248.

a *dasiputra.*[124] It is not necessary to constitute a woman a *dasi* that she should not have been a married woman.[125] She may be a widow when the illicit relationship begins,[126] or she may even be a married woman when such relationship begins, provided that in the latter case, the relationship has ceased to be adulterous when the son is conceived, as where the husband dies before conception.[127] The condition that the connection should not be adulterous or incestuous is not to be found in the texts; it seems to have been imposed on grounds of general morality.[128] Nor is it necessary that a marriage could have taken place between the boy's father and his mother.[129] He is not however, entitled to full rights of inheritance. The text of *Mitakshara* bearing on the subject is as follows:[130]

> The son begotten by a *Sudra* on a female slave obtains a share by the father's choice or at his pleasure. However, after (the demise of) the father, if there be sons of wedded wife, let these brothers allow the son of the female slave to participate for half a share; that is, let them give him half (as much as is the amount of one brother's) allotment.

The above text refers to the property of a separated householder.[131]

In *Ajit Kumar v Ujayar Singh*,[132] the Supreme Court summarised the law pertaining to the rights of inheritance of an illegitimate son to his putative father's self-acquired property. Relying upon this decision, the Andhra Pradesh High Court has held that an illegitimate son is entitled to an equal share with natural sons, but cannot ask for partition during the father's lifetime. In *Kamulammal v Visvanathaswami*,[133] the above text was interpreted by the Privy Council to mean that an illegitimate son takes one-half of what he would have taken if he was legitimate, that is to say, the illegitimate son takes one-fourth (1/2 x 1/2), and the legitimate son takes three-fourth. If a *Sudra* dies leaving one legitimate son and six illegitimate sons, then if the six illegitimate sons were legitimate, they would each take 1/7; being illegitimate, each of them will take 1/2 of 1/7, that is, 1/14 and the six together will take 3/7, and

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124 *Ramchandra Doddappa v Hanamnaik Dodnaik*, (1936) 60 Bom 75 : 37 Bom LR 920 : 160 IC 99 : AIR 1936 Bom 1; *Bachubhai v Dhanlaxmi*, AIR 1961 Guj 141; *Gontra Mongal Chandra v Dhirendra Nath*, (1976) Cal 129.

125 *Rahi v Govind,* (1876) 1 Bom 97; *Subramania v Rathnavelu*, (1918) 41 Mad 44, p 47 : 42 IC 556 : AIR 1918 Mad 1346; *Ramchandra v Sadashiva Rao*, AIR 1968 Mys 85.

126 *Chellammal v Ranganathan*, (1916) 40 Bom 369 : 32 IC 986 : AIR 1916 Bom 283.

127 *Tukaram v Dinkar*, (1931) 33 Bom LR 289 : 131 IC 883 : AIR 1931 Bom 221; *Mt Daulat Kuar v Bishundeo Singh*, (1940) 19 Pat 382 : 189 IC 883 : AIR 1940 Pat 310. Reference may also be made to *Tatayya v Nakaraju*, AIR 1958 AP 611.

128 *Soundarajan v Arunachalam*, (1916) 39 Mad 136, p 151 : 33 IC 858 : AIR 1916 Mad 1170 (FB).

129 *Soundarajan v Arunachalam,* (1916) 39 Mad 136 : 33 IC 858 : AIR 1916 Mad 1170 (FB); *Rajani Nath Das v Nitai Chandra Dei* (1921) 48 Cal 643 : 63 IC 50 : AIR 1921 Cal 820 (FB).

130 *Mitakshara*, Chapter I, section 12, *Volume* 2.

131 *Ranoji v Kandoji*, (1885) 8 Mad 557, p 561. See also *Deivanai Achi v Chidambaram Cheettiar*, AIR 1954 Mad 657, p 671 : (1955) 1 MLJ 120.

132 *Ajit Kumar v Ujayar Singh,* AIR 1961 SC 1334, p 1337; *Sadashiv v Bala*, AIR 1972 Bom 164 : (1971) 73 Bom LR 760; *Raghavendra Rao v Rajeshawara Rao*, (1974) 2 Andh WR 245; *Rasala Surya Prakasrao v Venkateswararao*, AIR 1992 AP 235 (also see notes under section 16 of the Hindu Succession Act).

133 *Kamulammal v Visvanathaswami,* (1923) 50 IA 32 : 46 Mad 167 : 71 IC 643 : AIR 1923 PC 8 (disapproving); *Kesaree v Samardhan* (1873) 5 NWP 9; *Chellammal v Ranganathan,* (1911) 34 Mad 277 : 12 IC 247; (1916) 40 Bom 369 : 32 IC 986 : AIR 1916 Bom 283.

the remaining 4/7 will go to the legitimate son.[134] This interpretation placed on the relevant text by the Privy Council has been accepted by the Supreme Court.[135]

Where there is no legitimate son, the illegitimate son is entitled to a moiety only of his father's estate when there is a widow, daughter or daughter's son. Where there is no legitimate son, but a daughter or daughter's son, the illegitimate son takes one-half of the whole estate, and the other half goes to the daughter, or to the daughter's son, as the case may be.[136] According to the Privy Council decision in *Kamulammal*'s case, referred to above, the half share which an illegitimate son takes is a half of that which he would have taken had he been legitimate. Applying that test, it is clear that had the illegitimate son been legitimate, he would have taken the whole estate to the exclusion of the daughter; being illegitimate, he takes one-half of the whole estate, and the daughter or daughter's son, as the case may be, takes the other half.[137] If there be no widow, daughter, or daughter's son, the illegitimate son takes the whole estate.[138] An adopted son stands on the same footing as the legitimate son.[139]

Where an illegitimate son and widow of the deceased *Sudra* inherit his property in equal shares and the widow thereafter dies, the illegitimate son, by operation of the doctrine of reversion, becomes entitled to the other half share taken by the widow.[140] The share allotted to the illegitimate son under *Mitakshara* is not in lieu of maintenance; it is in recognition of his status as a son.[141]

The legitimate son and the illegitimate son inherit their father's property as coparceners with a right of survivorship and necessarily with the right to claim partition of the self-acquired as well as ancestral property, left by the father.[142] Thus, if a *Sudra* dies leaving a legitimate son *A,* and an illegitimate son *B*, and *A* dies before partition without leaving a male issue, *B* will take *A*'s share by survivorship to the exclusion of *A*'s daughter, mother or other heir.[143]

The right of an illegitimate son of a *Sudra* to inherit to his father is not merely a personal right; it passes on his death to his legitimate issue. Thus, if a *Sudra A* has a legitimate son *B* and an illegitimate son *C* and *C* predeceases *A*, leaving a legitimate son *D*, then on *A*'s death, *D* will take a moiety of the share of *B,* that is, *B* will take 3/4, and *D* will take 1/4, that being the share of his father *C*. However, it would seem that an illegitimate son of a predeceased legitimate son of a *Sudra* is not entitled to succeed on the ground of representation.[144]

Where, on partition between a legitimate son and an illegitimate son, property is allotted to the widow, the illegitimate son can claim, on the widow's death, a share in

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134 *Maharaja of Kolhapur v Sundaram*, (1925) 48 Mad 1 : 93 IC 705 : AIR 1925 Mad 497.
135 *Gur Narain Das v Gur Tahal Das*, (1952) 1 SCR 869, p 875 : (1952) 2 MLJ 251 : AIR 1952 SC 225.
136 *Shesgiri v Girewa*, (1890) 14 Bom 282; *Meenakshi v Appakutti*, (1910) 33 Mad 226 : 4 IC 299; *Annayyan v Chinnan*, (1910) 33 Mad 366 : 5 IC 84.
137 *Karuppayee v Ramaswami*, (1932) 55 Mad 856 : 137 IC 645 : AIR 1932 Mad 440.
138 *Sarasvati v Mannu*, (1879) 2 All 134; *Mitakshara*, Chapter I, section 12, para 1.
139 *Maharaja of Kolhapur v Sundaram*, (1925) 48 Mad 1 : 93 IC 705 : AIR 1925 Mad 497.
140 *Ajit Kumar v Ujayar*, AIR 1961 SC 1334; *Kruppayee v Ramaswami*, AIR 1932 Mad 440.
141 *Vellaiyappa Chetty v Natarajan*, (1931) 55 Mad 1 58 IA 402, 134 IC 1084 : AIR 1931 PC 294.
142 See cases noted in *Apparao v Narasimha Rao*, AIR 1962 AP 515.
143 See § 312. *Raja Jogendra v Nityanund*, (1891) 18 Cal 151 : 17 IA 128 (on appeal from (1885) 11 Cal 7021); approving *Sadu v Baiza*, (1884) 4 Bom 37; *Gur Narain Das v Gur Tahal Das*, (1952) SCR 869 : (1952) 2 MLJ 251 : AIR 1952 SC 225.
144 *Govindarajulu v Balu Ammal*, (1951) 2 MLJ 209 : AIR 1952 Mad 1 (case-law considered).

the property allotted to her, as it stands on the same footing as property inherited from her husband.[145]

The illegitimate son of a *Sudra* inherits only to his father, he has no claim to inherit to collaterals. Thus, if a *Sudra* dies leaving a legitimate son *A* and an illegitimate son *B*, they will both inherit their father's property as coparceners. If they divide the property, *A* will take 3/4 and *B* will take 1/4. If *A* dies after partition, his share will pass to his own heirs, but in no case to *B*, *B* not being amongst his heirs. *B* can inherit to his father alone and not to his father's legitimate sons, nor his father's brothers nor any other collaterals.[146] If *A* dies while he is joint with *B* without leaving a male issue, his share would go to *B* by survivorship. However, *A*'s separate property would pass to his own heirs and not in any case to *B*. On the same principle, if a *Sudra* dies leaving an illegitimate son of his father and a half brother, the half brother is entitled to succeed, the illegitimate son being excluded from all collateral succession.[147] Moreover, just as an illegitimate son is not entitled to inherit to collaterals, so a collateral is not entitled to inherit to him. Thus, if a *Sudra* dies leaving a legitimate son *A* and an illegitimate son *B*, and *A* dies leaving a legitimate son *C* and *B* dies without leaving any relations, *C*, who is collateral, is not entitled to succeed to *B*'s property.[148]

The son of a *zamindar*, born of the *katar* form of marriage among the Tanwars or Kanwars (*Sudra*) is illegitimate and is not entitled to the *zamindari* in preference to the *zamindar's* cousin.[149] The only question raised before the Judicial Committee was as to the validity of the marriage. The other point was conceded obviously because the *zamindari* was impartible and the cousin took by survivorship (see § 587). The illegitimate son is not entitled to succeed to the *stridhana* of his father's wife.[150]

There can be no coparceners between a *Sudra* father and his illegitimate sons. However, it has been held by the High Court of Bombay that on the father's death, they hold the property inherited by them from him as coparceners and none of them can dispose of his interest in it by will.[151]

(*vi*) *Son Born of Anuloma Marriage.*—Under the Hindu law, as administered in the Bombay State, the marriage of a *Brahman* male with a *Sudra* woman is an *anuloma* marriage and is valid. A son born of such a marriage is legitimate, but he is entitled only to one-tenth share in the estate of his father. As regards the estate of his uncle also, he is entitled not to the whole of it, but only to a one-tenth share in it.[152]

(4) Widow.—(*i*) *Widow's estate.*—The widow takes only a limited interest called the widow's estate in the estate of her husband (§ 176). On her death, the estate goes not to her heirs, but to the next heirs of her husband, technically called reversion-

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145 *Bhagwantrao v Punjaram*, (1938) ILR Nag 255 : 174 IC 201 : AIR 1938 Nag 1.

146 *Shome Shankar v Rajesar*, (1899) 21 All 99; *Subramania v Rathnavelu*, (1918) 41 Mad 44 : 42 IC 556 : AIR 1918 Mad 1346 (FB); *Ayiswaryanandaji v Sivaji*, (1926) 49 Mad 116 : 92 IC 928 : AIR 1926 Mad 84; *Raj Fateh Singh v Baldeo v. Singh*, (1928) 3 Luck 416 : 109 IC 310 : AIR 1928 Ori 233.

147 *Dharma v Sakharam*, (1920) 44 Bom 185 : 55 IC 306 : AIR 1920 Bom 205.

148 *Zipru v Bomtya*, (1922) 46 Bom 424 : 64 IC 975 : AIR 1922 Bom 176.

149 *Mahabir v Sewak Singh*, (1934) 61 IA 106 : 147 IC 667 : AIR 1934 PC 74.

150 *Ayiswaryanandaji v Sivaji*, (1926) 49 Mad 116 : 92 IC 928 : AIR 1926 Mad 84.

151 *Shamu v Babu Aba*, (1928) 52 Bom 300 : 100 IC 116 : AIR 1928 Bom 153; *Packiriswamy v Doraswamy*, (1931) 9 Rang 226, pp 271–72 : 132 IC 817.

152 *Natha v Mehta Chhotalal*, (1931) 55 Bom 1 : 130 IC 17 : AIR 1931 Bom 89.

ers.[153] She is entitled only to the income of the property inherited by her. She has no power to dispose of the *corpus* of the property except in certain cases (§§ 178–180). She may, however, alienate her life interest in the estate. Section 14 of the Hindu Succession Act, 1956, subject to certain qualifications, confers full heritable capacity on a female heir in respect of all property acquired by her, whether before or after the commencement of the enactment.

(*ii*) *Unchastity.*—An unchaste widow was not entitled, under Hindu law to inherit to her husband. However, once the husband's estate has vested in her (which could only happen if she was chaste at the time of her husband's death), it was not divested by unchastity after her husband's death.[154] It has been held in a decision of the Bombay High Court[155] that the effect of the Hindu Women's Rights to Property Act, 1937, was to remove the bar of unchastity because the Act applied, notwithstanding any rule of Hindu law or custom to the contrary. The Calcutta High Court[156] and the Madras High Court[157] have taken the contrary view.

(*iii*) *Re-marriage.*—The re-marriage of a widow, though legalised by the Hindu Widow's Re-marriage Act, 1856, divests the estate inherited by her from her deceased husband. By her second marriage, she forfeits the interest taken by her in her husband's estate, and it passes to the next heirs of her husband as if she were dead (section 2 of the Act).[158] In *Pandurang v Sindhu*, the High Court of Bombay explained the effect of section 2 of the Act read with section 14 (1) of the Hindu Succession Act, 1956.[159] The reason for the rule laid down in section 2 is that a widow succeeds as the surviving half of her husband, and she ceases to be so on re-marriage. However, a widow does not by re-marriage lose her right to succeed to the estate of her son[160] or her daughter,[161] by her first husband. A Full Bench of the High Court of Madhya Pradesh had held that a widow is, upon her re-marriage, divested of her husband's property, which she has already obtained by inheritance to her son. She does not, however, forfeit self-acquired property of the son which she has inherited.[162] The Supreme Court has, however, held that a widow does not divest the right of inheritance to her deceased husband's portion of property on partition by virtue of

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153 See §§ 168, 170. *Bhagwandeen v Myna Baee*, (1867) 11 MIA 487.

154 *Moniram v Keri Kolitani*, (1880) 5 Cal 776 : 7 IA 115; *Sellam v Chinnammal*, (1901) 24 Mad 441; *Gangadhar v Yellu*, (1912) 36 Bom 138 : 12 IC 714; *Jadho Nagu v Jadho Gangu*, AIR 1958 AP 19.

155 *Akoba v Sai Genu*, ILR (1941) Bom 438 : AIR 1941 Bom 204 : (1941) 43 Bom LR 338.

156 *Kanailal v Pannasashi Mitra*, (1953) 58 CWN 743 : AIR 1954 Cal 588.

157 *Ramaiyya v Motayya*, (1952) Mad 187 : AIR 1951 Mad 954 (FB).

158 *Mussadi v Mst Chando*, AIR 1956 HP 45; *Setabi Dei v Ramdhani*, AIR 1966 Cal 60. It must be proved that necessary ceremonies of marriage were performed at the time of the remarriage—*Indrapati v Deputy Director of Consolidation*, AIR 1980 All 186.

159 *Pandurang v Sindhu*, AIR 1971 Bom 413 : (1971) 73 Bom LR 402.

160 *Akora Suth v Boreani*, (1869) 2 Beng LR 199 (AC); *Chamar Haru v Kashi*, (1902) 26 Bom 388; *Basappa v Rayava*, (1905) 29 Bom 91 (FB); *Ramaswamy v E Thevar*, AIR 1972 Mad 314. In *Pichandi v E Ramaswami*, AIR 1971 Mad 204, the competing heirs were father's father's son's son's daughter's son and the second husband's son of the mother of the *propositus*. The latter was preferred. Also see § 54 *Atma bandhus*, Entry no 27. Also see § 43-47 (iv)—Mother. *Lakshmana v Siva*, (1905) 28 Mad 425; *Kundan v Secretary of State*, (1926) 7 Lah 543 : 96 IC 865 : AIR 1926 Lah 673; *Pannalal v Harna Bai*, AIR 1950 Hyd 37; *Fagunswami Dasi v Dhum Lal*, AIR 1951 Cal 269, (1951) 2 Cal 76 (third marriage); *Thyamma v Giryamma*, AIR 1960 Mys 176; *Chinti v Harminder*, AIR 1987 HP 56 (customs).

161 *Bhiku v Keshav*, (1924) 26 Bom LR 235 : 80 IC 512 : AIR 1924 Bom 360.

162 *Bhondu v Ramdayal*, AIR 1960 MP 51.

her remarriage. This is, however, subject to the fact that she was a widow when the partition opened and the widow had re-married subsequently.[163]

Section 2 of the Hindu Widow's Re-Marriage Act, 1856, does not apply to estate legally and wholly acquired by the widow, for example, where under the husband's will, she is permitted to re-marry or where an absolute estate is conferred on her. The question would be one of construction in any such case.[164] For further reference, see *Sankaribala v Asita Baran.*[165]

Does a Hindu widow who has ceased to be a Hindu before her re-marriage, for example, by conversion to Mahommedanism, forfeits her right to her husband's property? According to the Calcutta,[166] Madras,[167] Bombay[168] and Patna[169] High Courts, the widow forfeits her rights to her husband's property. The Allahabad High Court holds a contrary view.[170]

There is a conflict of opinion as to whether a widow, who is entitled to re-marry by the custom of her caste, forfeits her interest in her husband's estate by re-marriage. It has been held by the High Court of Allahabad and the Chief Court of Oudh,that she does not; by the other High Courts, that she does.[171] The Allahabad High Court's view is that if the marriage of a Hindu widow takes place under an ancient custom existing before 1856, when the Hindu Widow's Re-marriage Act was passed, the question whether or not she is divested of her interest in the estate of her previous husband depends upon that custom and that custom alone. In other words, she would be divested of her interest only if such forfeiture is proved to be an incident of the custom itself and not otherwise.[172] The mere fact that there is a practice of re-marriage after 1856, would not necessarily be indicative of any ancient custom existing before the Act; such a custom has to be proved by the party relying on it.[173]

(*iv*) *Two or More Widows.*—Two or more widows succeeding as co-heirs to the estate of their deceased husband take as joint tenants with rights of survivorship and equal beneficial enjoyment. Thus, if a Hindu dies leaving two widows *A* and *B*, they are entitled as between themselves to an equal share of the income, and on the death of either of them, the other is entitled to the whole of the income by survivorship. Though, co-widows take as joint tenants, none of them has right to enforce an absolute partition of the estate against the others, so as to destroy their right of survivorship. However, they are entitled to obtain a partition of separate portions of the property, so that each may enjoy her equal share of the income accruing therefrom, and the court may, in a suit by any one of them, pass a decree for separate possession and enjoyment. Each can deal as she pleases with her own life-interest, but she cannot alienate any part of the *corpus* of the estate by gift or will, so as to prejudice the right

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163 *Gajodhari Devi v Gokul*, AIR 1990 SC 46 : 1989 Supp (2) SCC 160.
164 *Thangavelu Asari v Lakshmi Ammal*, AIR 1957 Mad 534; *Sankaribala v Asita Barani*, AIR 1977 Cal 289.
165 *Supra.*
166 *Matungini v Ram Rutton*, (1892) 19 Cal 289 (FB).
167 *Vitta v Chatakondu*, (1918) 41 Mad 1078 : 48 IC 50 : AIR 1919 Mad 854 (FB).
168 *Raghunath Shankar v Lakshmibai*, (1935) 59 Bom 417 : 37 Bom LR 150 : 157 IC 658 : AIR 1935 Bom 298.
169 *Mussammat Suraj v Attar*, (1922) 1 Pat 706 : 67 IC 550 : AIR 1922 Pat 378.
170 *Abdul Aziz v Nirma*, (1913) 35 All 466 : 20 IC 335.
171 *Gjodhara Devi v Gokul*, AIR 1990 SC 46.
172 *Bhola Umar v Mt Kausilla*, (1933) 55 All 24 : 140 IC 631 : AIR 1932 All 617; *Jileba v Parmesra*, AIR 1950 All 700. See the cases cited in § 560.
173 *Bhola Umar v Kausilla*, (1936) 58 All 1034 : 169 IC 504 : AIR 1937 All 230.

of the survivor or a future reversion. If they act together, they can burden the reversion with any debts contracted, owing to legal necessity, but one of them acting without the authority of the other, cannot prejudice the right of survivorship by burdening or alienating any part of the estate. The mere fact of partition between the two, while it gives each a right to the fruits of the separate estate assigned to her, does not imply a right to prejudice the claim of the survivor to enjoy the full fruits of the property during her lifetime.[174] However, the right of survivorship may be relinquished by agreement between the widows. Such an agreement may be effected orally and without a registered instrument.[175] Also see *Premshankar v Taradevi.*[176]

Co-widows being entitled to the estate of their husband jointly with the incident of survivorship, as mentioned above, it follows that if one of them re-marries, her interest would pass to the other.[177]

Where a Hindu dies leaving only one widow, she can alienate her life-interest in the property inherited by her from her husband, but she cannot alienate the corpus of the property except for legal necessity. An alienation of the corpus except for legal necessity does not bind the next heirs of her husband who succeed to his estate after the widow's death. Thus, if a Hindu dies, leaving a widow and a brother, and the widow sells or mortgages the corpus of the estate without legal necessity, the sale or mortgage binds only her life-interest. On her death, her husband's brother would succeed to the estate as his heir, and he would not be bound by the sale or mortgage, the same having not been made of legal necessity (§§ 181 to 181B, 185).

Where a Hindu dies leaving two or more widows, and they are in joint possession of the estate, any one of them may alienate her undivided interest in her husband's property. If anyone of the widows is in possession of a separate portion of the property, whether it be by mutual agreement between them or under a decree of the court, she may alienate her share of the income, which is derived from that portion. However, in either case, the alienation cannot take effect or have validity beyond her lifetime. It is good only during her life time, and on her death, her interest in the property goes to the co-widow by survivorship. She cannot alienate her interest so as to defeat the right of survivorship of the co-widow. That can only be done with the consent of the co-widow.[178] Thus, it is possible for the two co-widows, by an agreement among themselves to make an absolute partition of their joint estate, so as to extin-

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174 *Bhugwandeen v Myna Baee*, (1867) 11 MIA 487; *Karpagathachi v Nagarathinathachi*, AIR 1965 SC 1752; *Commr of IT v Indira*, AIR 1960 SC 1172; *Sri Gajapathi Nilamani v Radhamani*, (1877) 1 Mad 290 : 4 IA 212; followed in *Chhittar v Gaura*, (1912) 34 All 189 : 13 IC 320; *Sundar v Parbati*, (1889) 12 All 51 : 16 IA 186; *Gauri Nath Kakaji v Gaya Kaur*, (1928) 55 IA 399 : 111 IC 485 : AIR 1928 PC 251; *Appalasuri v Kannamma*, (1926) 90 IC 881 : AIR 1926 Mad 6; *Gaya Dei v Tulsha Devi*, (1935) 10 Luck 587 : 154 IC 125 : AIR 1935 Ori 296; *Jainarayan v Hirv*, (1933) 12 Pat 778 : 146 IC 322 : AIR 1933 Pat 464; *Dulhin Parbati Kuer v Baijnath Prasad*, (1935) 14 Pat 518; *Sivanancha v Thirunamakarsu*, AIR 1951 Tr & Coch 26; *Chanderjit Das v Debi Das*, (1953) 1 All 437 : AIR 1951 All 522; *Vaijnath v Dagdudas*, AIR 1954 Hyd 65; *Swaroop Narain v Bhanwar Kunwar*, AIR 1967 MP 152 (no adverse possession); *Ghellammal v Valliammal*, AIR 1978 Mad 21; *BSD Mahamandal v Premkuma*, AIR 1985 SC 1102.

175 See § 181C. *Latchumammal v Gangammal*, (1911) 34 Mad 72 : 7 IC 858.

176 *Premshankar v Taradevi*, AIR 1980 MP 171.

177 *Baratilal v Bindabai*, AIR 1963 MP 122.

178 *Bhugwandeen v Myna Baee*, (1867) 11 MIA 487; *Hari Narayan v Vitai*, (1907) 31 Bom 560; *Rammakkal v Ramasami*, (1899) 22 Mad 522; *Nagarathinathachi v Karpagathachi*, AIR 1962 Mad 482; *Janoki Nath v Mothuranath*, (1883) 9 Cal 580; *Durga Dat v Gita*, (1911) 33 All 443, p 449 : 9 IC 498; *Nandi v Sarap Lal*, (1917) 39 All 463 : 40 IC 71 : AIR 1917 All 179.

guish the right of survivorship inter se.[179] However, any alienation on the strength of such arrangement will not affect the rights of the reversioners in anyway.[180]

Two or more widows cannot by any agreement between them affect the rights of the ultimate reversioners.[181]

(4A) Predeceased son's widow, widow of predeceased son of predeceased son.—(see § 35).

(5) Daughter.—(*i*) *Priority among daughters.*—Daughters do not inherit until all the widows are dead. When the father predeceased his own father before 1956, when the Hindu Succession Act had not come into force, the daughter could not claim to succeed as heir to the fathers share as the property would devolve by survivorship and not by succession, it being governed by *Shastrik* law.[182] As between daughters, the inheritance goes first to the unmarried daughters,[183] next, to daughters who are married and 'unprovided for', i.e., indigent, and lastly, to daughters who are married and are 'enriched', i.e., possessed of means.[184] A married daughter may be a widow.[185] No member of the second class can inherit while any member of the first class is in existence, and no member of the third class can inherit while any member of the first or the second class is in existence. The rule about one married daughter excluding the other married daughter from inheritance comes into operation, only if one daughter is indigent and the other is possessed of wealth. It does not apply where both the daughters are financially well off and well placed in life.[186] The rules of preference are those stated above and there is no rule of preference that a daughter who is without issue is to be preferred to one with issue.[187] Nor is there any rule that a daughter who is married to an idol and leads the life of a prostitute is to be preferred to her married sisters.[188]

(ii) Survivorship.—Two or more daughters of a class take the estate jointly as in the case of widows, with rights of survivorship.[189] Any one daughter may alienate her life-interest in the property, but not so as to affect the rights of survivorship of other daughters.[190] Moreover, like widows, daughters may enter into any agreement regard-

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179 *Karpajathachi v Nagarathinathachi*, AIR 1965 SC 1752; *Bindumati v Nar Vada Prasad*, AIR 1977 SC 394.

180 *Hazarilal v Halkulal*, (1948) ILR Nag 662.

181 *Sri Gajapati v Pusapati*, (1893) 16 Mad 1 : 19 IA 184; *Mahadevappa v Basagawada*, (1904) 29 Bom 346; *Vadali v Kotipalli*, (1903) 26 Mad 334; *Subbammal v Avudaiyammal*, (1907) 80 Mad 3.

182 *Devidas Gaurkar v Vithabai*, AIR 2008 Bom 183 : (2008) 5 ALL MR 363.

183 *Jamnabai v Khimji*, (1890) 14 Bom 1, p 13; *Gobind v Ram Adhin*, (1933) 8 Luck 182 : 140 IC 556 : AIR 1933 Ori 31; *Bayava v Parvateva*, (1933) 35 Bom LR 118 : 144 IC 442 : AIR 1933 Bom 126.

184 *Manki v Kundan*, (1925) 47 All 403 : 87 IC 121 : AIR 1925 All 375; *Totawa v Basawa*, (1899) 23 Bom 229; *Audh Kumari v Chandra Dai*, (1879) 2 All 561; *Danno v Darbo*, (1882) 4 All 243; *Savitribai v Sidu*, (1945) Nag 871. Reference may also be made to *Dewala v Rupsir*, AIR 1960 MP 35; *Latabati Palrani v Dhubani*, AIR 1966 Ori 73 (each case may depend on its own facts); *Sarala Bala v Banamali*, AIR 1964 Ori 140.

185 *Rajrani v Gomati*, (1928) 7 Pat 820 : 111 IC 673 : AIR 1928 Pat 466.

186 *Shivprasad v Jankibai*, (1953) Bom 219 : (1952) 54 Bom LR 940 : AIR 1953 Bom 321.

187 *Rajamma v Padmavatamma*, (1952) ILR Mad 668 : AIR 1951 Mad 1047.

188 See § 147. *Saraswathi Ammal v Jagadambal*, (1953) SCR 939 : (1953) 1 MLJ 697 : AIR 1953 SC 201.

189 *Aumirtolall v Rajoneekant*, (1875) 2 IA 113, p 126 : 15 Beng LR 10, p 24. What is applicable to co-widows is equally applicable to daughters—*BSD Mahamandal v Prem Kumar*, AIR 1985 SC 1102 : (1985) 3 SCC 350; *Karpagathachi v Nagarathinathachi*, AIR 1965 SC 1752; *Chhattar Singh v Hukum Kunvar*, (1936) 58 All 391; *Surendranath Basu v Radha Rani Debi*, (1940) 2 Cal 41.

190 *Kanni v Ammakannu*, (1900) 23 Mad 504; *Yelumalal Chetty v Natesachari*, (1945) Mad 35; *Pathumma Beebi v Krishna Asari*, AIR 1961 Ker 247; *Subbiah Chetty v Veerajinow*, AIR 1979 Mad 85.

ing their respective rights in their father's estate, provided such agreement does not prejudice the rights of reversioners.[191] They may divide the estate merely with a view to convenient enjoyment, or, retaining the right of the survivor, to take the whole on the death of one of them, or they may agree that the right of survivorship should be extinguished as between themselves.[192] The agreement may be effected orally and without a registered writing.[193]

(iii) Limited estate.—The daughter takes a limited interest in the estate of her father corresponding to the widow's estate. On her death, the estate passes not to her heirs, but to the next heirs of her father[194] (see § 169). The next heirs of the father are called reversioners. As to Bombay state, see note (iv).

Where an unmarried daughter of the deceased inherits one half of the property of her father, and the deceased had died prior to coming into force of the Hindu Succession Act, the daughter inherits only a limited estate which, according to the rules of *Mitakshara* succession, would pass on to the next male heir of the deceased on such daughter's death and the sister of such deceased unmarried daughter cannot claim any share in such property.[195]

Section 14 of the Hindu Succession Act, 1956, subject to certain qualification, confers full heritable capacity on a female heir in respect of the entire property acquired by her, whether before or after the commencement of the enactment.

(iv) In the Bombay State.—Rules (ii) and (iii) do not apply in the Bombay state (see § 72, No 7). *A* has two daughters, *B* and *C*. *B* has a daughter *D*. On *A*'s death, his estate will go to *B* and *C*. In places other than the Bombay state, they each take a 'woman's estate' with rights of survivorship. Therefore, on *B*'s death, her interest in the estate will go, not to her daughter *D,* but her sister *C* by survivorship. In the Bombay state, however, it is different. There on *A*'s death, *B* and *C* will each take an absolute interest in a moiety of the estate so that on *B*'s death, her moiety will go to her heir *D*, and on *C*'s death, her moiety will go to her own heirs.

(v) Unchastity.—Unchastity of a daughter is no ground for exclusion from inheritance[196] except that in Bombay, where if there is an unmarried daughter who is a prostitute and a married daughter who is chaste, the latter succeeds in preference to the former.[197] It may here be observed that under *Mitakshara* law, a widow is the only female who is excluded from inheritance by reason of unchastity.[198]

(vi) Illegitimate daughter.—The illegitimate daughter, even of a *Sudra*, has no rights of inheritance to her father.[199] However, she is entitled to inherit to her mother.[200] An illegitimate daughter is not, however, entitled to succeed to the collaterals of her mother.[201]

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191 *Kailash v Kashi*, (1897) 24 Cal 339; *Alamelu v Balu*, (1920) 43 Mad 849 : 26 IC 455 : AIR 1915 Mad 103; *Karpagathachi v Nagarathinathachi*, AIR 1965 SC 1752

192 *Sundarasiva v Vijamma*, (1925) 48 Mad 933 : 91 IC 40 : AIR 1925 Mad 1267.

193 As to Bombay state, see note (d). *Alamelu v Balu* (*supra*).

194 *Chotay Lall v Chunno Lall*, (1879) 4 Cal 744 : 6 IA 15; *Muttu v Dorasinga* (1881) 3 Mad 290, 8 IA 99.

195 *Palasseri Velayudhan v Palasseri Ithayi*, AIR 1994 Ker 267.

196 *Advyapa v Rudrava*, (1880) 4 Bom 104; *Kojiyadu v Lakshmi*, (1882) 5 Mad 149, 156.

197 *Tara v Krishna*, (1907) 31 Bom 495; *Govind Bhawshet v Bhike Mahadeoshet*, (1945) 5 FCR 1.

198 *Vedammal v Vedanayaga*, (1908) 31 Mad 100.

199 *Bhikya v Babu*, (1908) 32 Bom 562.

200 *Arunagiri v Ranganayaki*, (1898) 21 Mad 40.

201 See §§ 163 and 164. *Pandurang v Administrator-General of Bombay*, (1953) Bom 435 : AIR 1953 Bom 127 : (1952) 54 Bom LR 892.

(vii) Exclusion by custom.—A daughter may be excluded from inheritance by special family or local custom.[202]

In the Makkathayee Ezhava community of the erstwhile state of Cochin, there is no custom entitling a daughter to any share along with the son in the property left by the deceased father.[203]

(6) Daughter's son.—*(i) When entitled to succeed.*—The daughter's son is not entitled to succeed, if there be any daughter living and capable of inheriting.[204] A daughter's son is strictly a *bandhu* or *bhinna gotra sapinda*, being related to the deceased through a female, but he inherits with *gotraja sapindas* by virtue of express texts,[205] [see note (v)]. He succeeds not as an heir to his mother, but as an heir to his own maternal grandfather.

(ii) Takes as full owner.—The daughter's son takes the estate as full owner like any other male heir, and on his death, the succession passes to his heirs and not to the heirs of his maternal grandfather.[206]

(iii) Takes per capita.—The daughter's son takes per capita, and not per stirpes. *A* has two daughters, *B* and *C*. *B* has two sons, and *C* has three. *B* and *C* die in *A*'s life-time. *A* then dies leaving five grandsons. The estate will be divided into five shares, each grandson taking one share.

(iv) Where daughter's sons are joint.—It was held by the Judicial Committee in 1902 that two or more sons by a daughter, living as members of a joint family, take the estate inherited by them from their maternal grandfather as joint tenants with rights of survivorship.[207] It is doubtful, how far this remains good law (see § 31(1)(b) and 221(2)). However, sons by different daughters would take as tenants-in common, for there can be no coparcenary between sons by different daughters.[208] *A* dies leaving two grandsons *C* and *D* by different predeceased daughters. *C* dies living a widow. *C*'s interest in the estate will pass to her as his heir, and not to *D* by survivorship.

(v) The daughter's son occupies a peculiar position in Hindu law. He is a *bhinna gotra sapinda* or *bandhu*, but he comes in before parents and other remote *gotraja sapindas*. The reason is that, according to the old practice, it was competent to a Hindu, who had no son, to appoint a daughter to raise up issue to him. Such a daughter, no doubt, was the lawful wife of her husband, but her son, called *putrika putra*, became the son of her father. Such a son was equal to an *aurosa* or legitimate son, and took his rank, according to several authorities, as the highest among the secondary sons. Although, the practice of appointing a daughter to raise up issue for her father became obsolete, the daughter's son continued to occupy the place that was assigned to him in the order of inheritance and even now he takes a place practically

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202 *Bajrangi v Monokarnika*, (1908) 30 All 1 : 35 IA 1; *Parbati v Chandarpal*, (1909) 31 All 457 : 36 IA 125 : 4 IC 25; *Balgobind v Badri Prasad*, (1923) 50 IA 196 : 45 All 413 : 74 IC 449 : AIR 1923 PC 70; *Raj-Bachan Singh v Bhanwar*, (1929) 4 Luck 690, 118 IC 760 : AIR 1929 Ori 296. In *Rajpati v Jagmohan*, AIR 1952 All 309, the anomaly that can arise by operation of section 3 (a) of Act II [2] of 1929 was pointed out.

203 *Kamalakshy v Narayani*, AIR 1968 Ker 123.

204 *Bajinath v Mahabir*, (1878) 1 All 608; *Sant Kumar v Deo Saran*, (1886) 8 All 365.

205 *Srinivas v Dandayudapani*, (1889) 12 Mad 411.

206 *Muttu v Dorasinga*, (1881) 3 Mad 290 : 8 IA 99; *Muttuvaduganadha v Periasami*, (1896) 19 Mad 451 : 23 IA 128.

207 *Venkayyamma v Venkataramanayyamma*, (1902) 25 Mad 678 : 29 IA 156.

208 *Vythinatha v Yeggia*, (1904) 27 Mad 382, p 385.

next after the male issue, the widow and the daughters being simply interposed during their respective lives.[209] 'In regard to the obsequies of ancestors,' says *Mitakshara*, 'daughter's sons are considered as son's sons'.[210]

Putrika Putras: In *Shyam Sunder v State of Bihar,*[211] the Supreme Court examined the relevant text in Sanskrit and decisions on the subject and held that the practice of appointing a daughter as *putrika* and of treating her son as *putrika putra* had become obsolete several centuries ago.

(7) Mother[212]**.**—*(i) Mayukha Law.*—In cases governed by *Mayukha*, the father is preferred to the mother.[213]

(ii) Limited interest.—The mother takes a limited interest in the estate of her son corresponding to the widow's estate. On her death, the estate passes not to her heirs, but to her son's heirs.[214]

Section 14 of the Hindu Succession Act, 1956, subject to certain qualifications, confers full heritable capacity on a female heir in respect of the entire property acquired by her, whether before or after the commencement of the Act.

(iii) Unchastity and remarriage.—Unchastity of a mother is no bar to her succeeding as heir to her son, nor does remarriage constitute any such bar.[215]

(iv) Step-mother.—A stepmother is not entitled to inherit to her stepson.[216] In the Bombay state, however, she is an heir, for she is regarded there as a *sagotra sapinda* but comes after the female heirs recognised in Bombay are exhausted.[217] See § 68 and *Anandi v Hari.*[218]

(v) Adoptive mother.—Mother includes adoptive mother, so that an adoptive mother, according to *Mitakshara* law, succeeds before the adoptive father. On the death of a son adopted in *dwyamushyayana* form, the adoptive mother and the natural mother both inherit equally as co-heiresses.[219]

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209 In Bombay, the daughter takes not for life but absolutely. *Karuppai v Sankaranarayanan*, (1904) 27 Mad 300, pp 311–12; *Babui Rita v Mal Puran*, (1916) 1 Pat LJ 581 : 38 IC 44 : AIR 1916 Pat 8; *Ghanta China v Moparthi*, (1947) 51 CWN 875, p 883 (PC).

210 *Mitakshara*, Chapter II, section 2, Volume 6.

211 *Shyam Sunder v State of Bihar,* AIR 1981 SC 178.

212 *Anandi v Hari*, (1909) 33 Bom 404 : 3 IC 745.

213 *Khodabhai v Bahadhar*, (1882) 6 Bom 541.

214 *Vrijbhukandas v Bai Parvati*, (1908) 32 Bom 26; *Jullessur v Uggar*, (1883) 9 Cal 725.

215 *Kasturi Devi v Deputy Director, Consolidation*, AIR 1976 SC 2592; *Kojiyadu v Lakshmi*, (1882) 5 Mad 149; *Vedammal v Vedanayaga*, (1908) 31 Mad 100; *Dal Singh v Dini*, (1910) 32 All 155 : 5 IC 521; *Baldeo v Mathura*, (1911) 33 All 702 : 11 IC 43 (unchastity); *Basappa v Rayava*, (1905) 29 Bom 91 (FB) (remarriage); *Bhondu v Ramdayal*, AIR 1960 MP 51 (FB); *Thayamma v Giriyamma*, AIR 1960 Mys 176; *Ramaswamy v E Thevar*, AIR 1972 Mad 314; *Pichandi v E Ramaswami*, AIR 1971 Mad 204. Also see § 43–4 (iii), Widow and § 54, *Atma Bandhu*, Entry 27.

216 *Pitra Kueri v Ujagir Rai*, AIR 1958 All 101; *Rama Nand v Surgiani*, (1894) 16 All 221; *Ramasami v Narasamma*, (1885) 8 Mad 133; *Tahaldai v Gaya Pershad*, (1910) 37 Cal 214 : 5 IC 135; *Seethai v Nachiyar*, (1914) 37 Mad 286 : 22 IC 18 : AIR 1914 Mad 30; *Navanitha Krihna v Collector of Tinnevelly*, (1935) MWN 1001; *Chattar Singh v Roshan Singh*, AIR 1946 Nag 277 (case from Central Province, where the *lex loci* is Benaras law); *Gorulal v Gopichand*, AIR 1963 Raj 149.

217 *Kesserbai v Vallab*, (1880) 4 Bom 188; *Russoobai v Zoolekhabai*, (1895) 19 Bom 707; *Pannalal v Harna Bai*, AIR 1950 Hyd 37.

218 *Anandi v Hari,* (1909) 33 Bom 404 : 3 IC 745.

219 *Basappa v Gurlingawa*, (1933) 57 Bom 74 : 142 IC 634 : AIR 1933 Bom 137; *Kantawa v Sangangowda*, (1942) Bom 303 : 201 IC 633 : AIR 1942 Bom 143.

(8) Father.—*(i) Mayukha Law.*—In cases governed by *Mayukha*, the father succeeds before the mother. See above, 'mother,' note no 7.

(9) Brother.—(a) of the whole blood;

(b) of the half-blood.

(i) Whole before half-blood.—Brothers of the whole blood succeed before those of the half-blood.[220] The half-brothers referred to here are sons of the same father by a different mother. Sons of the same mother by a different father are not entitled to succeed as 'brothers'.[221]

(ii) Takes before brother's son.—The brother succeeds before the brother's son.[222]

(iii) Mayukha Law.—In cases governed by *Mayukha*, brothers of the half-blood share with the father's father.[223]

To the separate property of a person, all his brothers succeed, though some are joint with him as to other property and others are completely divided from him.[224]

(10) Brother's son.—(a) of the whole blood;

(b) of the half-blood.

(i) Takes before brother's son's son.—The brother's son succeeds before the brother's son's son.[225]

(ii) Whole blood before half-blood.—Sons of brothers of the whole blood succeed before sons of brothers of the half-blood (see § 44).

(iii) Takes per capita.—Brother's son takes per capita (§ 32).

Mitakshara, in discussing the place of the father's mother in the order of succession, say:

No place, however, is found for her in the compact series of heirs from the father to the nephew...

She must, therefore, of course succeed immediately after the nephew.[226]

According to this text, as literally interpreted 'the compact series of heirs,' that is the series of heirs first entitled to inherit, ends with the brother's son. However, it has been held by the Privy Council in *Buddha Singh v Laltu Singh*,[227] that the expression 'brother's son' in the above text includes 'brother son's son,' so that the compact series ends not with the brother's son, but with the brother's son's son (no 11), and the father's mother (no 12), takes not after the brother's son, but after the brother's son's son.

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220 *Anant Singh v Durga Singh*, (1910) 37 IA 191 : 32 All 363 : 6 IC 787; *Mannalal v Ishwariprasad*, (1966) Cal 447.

221 *Ekoba v Kashiram*, (1922) 46 Bom 716 : 60 IC 341 : AIR 1922 Bom 27; *Chhinu v Kata*, AIR 1972 Ori 153.

222 *Chinnaswami v Ponginanna Goundar*, AIR 1957 Mad 40.

223 Chapter V section 8, para 20.

224 *Shamrao v Krishnarao*, (1941) ILR Nag 598 : AIR 1941 Nag 297; *Deivanayagam v Subbiah*, (1954) Mad 741 : AIR 1954 Mad 727; *Karhiley v Hira*, AIR 1952 All 229 (FB).

225 *Sher Singh v Basdeo Singh*, (1928) 50 All 904 : 110 IC 712 : AIR 1928 All 612.

226 *Mitakshara*, Chapter II, section 5, Volume 2.

227 *Buddha Singh v Laltu Singh*, (1915) 42 IA 208 : 37 All 604 : 30 IC 529 : AIR 1915 PC 70 approving *Kalian Rai v Ram Chandra*, (1902) 24 All 128; disapproving *Suraya v Lakshminarasamma*, (1882) 5 Mad 291.

(11) Brother's son's son.—*(i) See notes to no 10 above.*

(ii) Whole blood before half-blood.—Grandsons of the whole brother take before the grandsons of the half-brother (see § 44).

(iii) The brother's son's son takes per capita (§ 32).

(iv) The compact series of heirs under *Mitakshara*, as interpreted by the Privy Council, ends with the brother's son's son. See no 10 above.

(12) Father's mother.

(13) Father's father.

(13A) Son's daughter.

(i) This is the place assigned to the son's daughter by the Hindu Law of Inheritance (Amendment) Act 2 of 1929. Before that Act, she was recognised as an heir only in Bombay and Madras (§ 56) states, where she ranked as a *bandhu*. Under the Act, she inherits as an heir in all places where *Mitakshara* law applies, and succeeds immediately after the father's father; see note to no 13D, 'Hindu Law of Inheritance (Amendment) Act, 1929 (2 of 1929)'.

(ii) Estate.—The son's daughter takes an absolute estate in Bombay [§170 (2)]. In Madras, she takes a limited estate (§ 168). She would also take a limited estate elsewhere.

Section 14 of the Hindu Succession Act, 1956, subject to certain qualifications, confers full heritable capacity on a female heir in respect of the entire property acquired by her, whether before or after the commencement of that enactment.

(13B) Daughter's daughter.—(i) This is the place assigned to the daughter's daughter by the Hindu Law of Inheritance (Amendment) Act, 1929 (2 of 1929), and she comes before the sister.[228] Before this Act, she was recognised as an heir only in Bombay and Madras [§ 56] states, where she ranked as a *bandhu*. Under the Act, she inherits as an heir in all places where *Mitakshara* law applies, even in states where, before the Act, she was not an heir,[229] and succeeds next after the son's daughter (see note to no 13D, 'Hindu Law of Inheritance (Amendment) Act 2 of 1929').

(ii) Estate.—The daughter's daughter takes an absolute estate in Bombay [§ 170 (2)]. In Madras, she takes a limited estate (§ 168). She would also take a limited estate elsewhere (see also 13A).

(13C) Sister.—(i) This is the place assigned to the sister by the Hindu Law of Inheritance (Amendment) Act 2 of 1929.* Before that Act, she was recognised as an heir only in Bombay (§ 64) and Madras states (§ 50). However, the Act is applicable even where the sister had not been previously recognised as an heir.[230]

As regards the Bombay state, she is expressly mentioned as an heir in *Mayukha*. She is not, however, expressly mentioned as such in *Mitakshara*, but her right as an heir has long been recognised [§ 64(1)]. Her place also in the order of succession has long since been established; she succeeds immediately after the father's mother, and before the father's father (§§ 65(1), 72(12), 77(12)). Her place in the order of

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228 *Ben Madhu v Kalidas*, (1949) Bom 722.

229 *Dalsingar Singh v Jainath Kuari*, (1940) 15 Luck 229 : 136 IC 753 : AIR 1940 Ori 138.

* Now repealed by the Hindu Succession Act, 1956 (30 of 1956).

230 *Bindeshwari Singh v Baij Nath Singh*, (1938) 13 Luck 380 : 168 IC 733 : AIR 1937 Ori 402; *Mt Rajpali Kunwar v Surju Rai*, (1936) 58 All 1041 (FB) : 163 IC 756 : AIR 1936 All 507.

succession is not affected by the Act, for the Act contemplates succession after the father's father, while her place as determined by a series of decisions since 1865, is immediately after the father's mother whether under *Mitakshara* or *Mayukha*.[231] A different view has however been taken in a later Bombay case and it has been held that the position of the sister under *Mayukha* law has been adversely affected by the Hindu Law of Inheritance Act.[232]

In the Madras state, the sister was ranked as a *bandhu* before the Act [§ 56(1)]. Under the Act, she succeeds next after the daughter's daughter.

In Punjab, as held by the Supreme Court, the Sikh Jats of Amritsar district are governed by Hindu law and under Hindu law of Inheritance (Amendment) Act, 1929, the sister is an heir in preference to collaterals.[233]

(ii) Half-sister.—The question, whether a half-sister gets the benefit of the Act has given rise to difference of opinion. The Privy Council held (thus settling the difference between the various High Courts), that the term 'sister' includes a half-sister; but a full sister and a half-sister do not take together. The latter takes only in default of the full sister.[234]

(iii) Estate.—The sister takes an absolute estate in Bombay [§ 170(2)]. In Madras, she takes a limited estate (§ 168). She would also take a limited estate elsewhere. Section 14 of the Hindu Succession Act, 1956, subject to certain qualifications, confers full heritable capacity on a female heir in respect of the entire property acquired by her, whether before or after the commencement of that enactment.

(iv) In *Lala Duni Chand v Anarkali*, the Judicial Committee[235] held and it has also been held by the Supreme Court[236] that the Act applies not only to the case of a Hindu male dying intestate, on or after 21 February 1929, when it came into force, but also to the case of such a male dying intestate before that date, if, he was succeeded by a female heir who died after that date. In such a case, succession to the estate of the last male, who died intestate, does not open until the death of the life-estate holder. In consequence, the questions as to who is the nearest reversionary heir, or what is the class of reversionary heirs, falls to be settled at the date of the expiry of the ownership for life or lives and one most nearly related at that time to the last full owner becomes for life or lives, entitled to the estate. However, the Act obviously does not apply where succession opened before the Act.[237]

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231 *Shidramappa v Neelavabai*, (1933) 57 Bom 377 : 144 IC 925 : AIR 1933 Bom 272; *Virbhadrappa v Babu Virbhadrappa*, (1946) ILR Bom 1003.

232 *Ben Madhu v Kalidas*, (1949) ILR Bom 722.

233 *Ujagar Singh v Jeo*, AIR 1959 SC 1041.

234 *Mt Sahodra v Ram Babu*, (1943) 69 IA 145 : 45 Bom LR 350 : 206 IC 396 : AIR 1943 PC 10.

235 *Lala Duni Chand v Mt Anar Kali*, (1946) 73 IA 187 : 51 CWN 223 : AIR 1946 All 748; *Shakuntala Devi v Kaushalya Devi*, (1936) 17 Lah 356 : 162 IC 718 : AIR 1936 Lah 124; *Mt Sattan v Janki*, AIR 1936 Lah 139 : 163 IC 480; *Bindeshwari Singh v Baij Nath Singh*, (1938) 13 Luck 380 : 168 IC 733 : AIR 1937 Ori 402; *Pokhan Dusadh v Must Manoa*, (1937) 16 Pat 215 (FB) : 167 IC 17 : AIR 1937 Pat 117; *Jitendra Pratap v Bhagwati Prasad*, AIR 1956 Pat 457; *Mt Rajpali Kunwar v Surju Rai*, (1936) 58 All 1041 (FB) : 163 IC 756 : AIR 1936 All 507; *Lakshmi v Anantharama*, (1937) Mad 948 FB : 171 IC 7 : AIR 1937 Mad 699.

236 *Fateh Bibi v Charan Das*, AIR 1971 SC 789 (sister's son).

237 *Kanhaiya Lal v Mt Champa Devi*, (1935) 153 IC 545 : AIR 1935 All 203.

(13D) Sister's son.—*(i)* This is the place assigned to the sister's son by the Hindu Law of Inheritance (Amendment), 1929 (Act 2 of 1929).* Before that Act, he ranked as a *bandhu* (§ 64, no 3). Under the Act, he succeeds next after the sister.

*(ii) Hindu Law of Inheritance (Amendment) Act 2 of 1929**.—This Act applies only to cases 'subject to the law of *Mitakshara*.' The expression 'law of *Mitakshara*' includes all sub-divisions of *Mitakshara* law including *Mayukha* and excludes the law of *Dayabhaga*.[238] The material section is section 2, which is as follows:

A son's daughter, daughter's daughter, sister, and sister's son shall in the order so specified, be entitled to rank in the order of succession next after a father's father (no 13) and before a father's brother (no 14): *Provided* that a sister's son shall not include a son adopted after the sister's death. The Act came into force on 21 February 1929. See 13C (iv) above.

The Act applies to Jains in Gujarat governed by *Mayukha*, the sister's son is therefore preferred to father's sister.[239]

In ascertaining the heirs of a maiden's father—they being her heirs in respect of her *stridhana,* when she dies leaving neither brother, mother nor father—Act II of 1929 is not applicable. However, see further under § 147.

(13E) Half-sister's son.—This is the place which should be given to the half-sister's son according to the Act (see note under Half-sister above).

(14) Paternal uncle.

(15) Paternal uncle's son.

(16) Paternal uncle's son's son

He succeeds before 20.[240]

Whole blood and half-blood.—See § 44 and notes thereto.

(17) Father's father's mother.

(18) Father's father's father.

(19) Father's paternal uncle.

(20) Father's paternal uncle's son.

(21) Father's paternal uncle's son's son.

(22) Brother's son's son's son.[241]

(23) Uncle's son's son's son.

Following the reasoning of the Privy Council in *Buddha Singh v Laltu Singh,*[242] the Madras High Court held that the father's paternal uncle's son's son [x_3 in the third line of Table IV.1 should be preferred to the great-grandson of the grandfather (x_4 in the second line of the table)].[243] The decision implies that he would be also preferred

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* Now repealed by the Hindu Succession Act, 1956 (30 of 1956).

238 *Ben Madhu v Bai Mahakore*, AIR 1950 Bom 66.

239 *Ambabai v Keshav Bandochand,* (1941) Bom 250 : 195 IC 172 : AIR 1941 Bom 233 : 43 Bom LR 114.

240 *Buddha Singh v Laltu Singh,* (1915) 42 IA 208 : 37 All 604 : 30 IC 529 : AIR 1915 PC 70.

241 *Venilal v Parjaram*, (1896) 20 Bom 173.

242 *Buddha Singh v Laltu Singh,* (1915) 42 IA 208 : 37 All 604 : 30 IC 529 : AIR 1915 PC 70.

243 *Soobramiah v Nataraja*, (1930) 53 Mad 61 : 127 IC 113 : AIR 1930 Mad 534.

to the great-grandson of the father (x_4 in the first line of the table), who will also be postponed to the paternal uncle's son's son (x_3, in the second line of the table).[244]

So far as the ancestors and descendants are concerned, the further continuation of the table is of no practical importance. As to collaterals beyond this stage, it is difficult to see that one claimant can be superior to another in the capacity to confer spiritual benefit. The rules of preference will then probably be:

(1) he who claims through a nearer ancestor will be preferred to one claiming through a remoter ancestor;

(2) in the line of any ancestor, the nearer excludes the more remote.

§ 44. Whole blood and half-blood.—(1) A *sapinda* of the whole blood is preferred to a *sapinda* of the half-blood. This preference, however, is confined to *sapindas* of the same degree of descent from the common ancestor; it does not apply to *sapindas* of different degrees.[245]

In Uttar Pradesh,[246] Bengal[247] and Madras,[248] this rule applies not only to brothers and brothers' sons, but to remoter *sapindas*. It has been held by the Privy Council that the rule applies to all *Mitakshara* schools[249] and the Bombay cases[250] holding a different view are overruled. The Punjab case[251] holding a view similar to Bombay must also be regarded as overruled.

Thus, a paternal uncle of the whole blood is entitled to succeed in preference to a paternal uncle of the half-blood, they being *sapindas* of the same degree of descent. However, a paternal uncle of the half-blood is entitled to inherit in preference to the son of a paternal uncle of the whole blood, the former being nearer *sapinda* of the deceased than the latter.

According to the customary law of Kumaon, applicable to the Khasas, if a man dies sonless, his brothers do not inherit as brothers, but as sons of the father to whom the estate reverted on the sonless man's death. When the nephews or cousins succeed, they take their father's share, i.e., *per stirpes* and not *per capita.*[252] However, this principle does not apply to the Manrals.[253]

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244 *Venkateswara Rao v Adinarayana*, (1935) 58 Mad 323 : 154 IC 923 : AIR 1935 Mad 129.

245 *Suba Singh v Sarafraz*, (1897) 19 All 215 (FB); *Ganga Sahai v Kesri*, (1915) 42 IA 177 : 37 All 545 : 30 IC 265 : AIR 1915 PC 81. Reference may be made to *Waman Govind v Gopal Baburao*, AIR 1984 Bom 208, p 212 (FB).

246 *Suba Singh v Sarafraz*, (*supra*).

247 *Sham Singh v Kishun Sahai*, (1907) 6 Cal LJ 190.

248 *Nachiappa v Rangasami*, (1915) 28 Mad LJ 1 : 26 IC 757 : AIR 1915 Mad 1088 (FB).

249 *Garudas v Laldas*, (1933) 60 IA 189 : 142 IC 807 : AIR 1933 PC 141; *Kalagouda v Annagouda*, AIR 1962 Mys 65.

250 *Samat v Amra*, (1882) 6 Bom 397; *Vithalrao v Ramrao*, (1900) 24 Bom 317; *Saguna v Sadashiv*, (1902) 26 Bom 710, p 715; *Shankar Baji v Kashinath*, (1927) 51 Bom 194 : 100 IC 430 : AIR 1927 Bom 97.

251 *Hira Nand v Maya Das*, (1894) Punj Rec no 83.

252 *Tula Ram v Shyam Lal*, (1924) 49 All 848; *Gangi Sah v Harlal Sah*, (1939) All 122.

253 *Lachhan Singh v Jhagar Singh*, (1939) All 406 : AIR 1939 All 437.

Samanodakas

§ 45. Order of succession among *samanodakas*.—Failing all *sapindas*, the inheritance passes to *samanodakas*, the nearer line excluding a remoter kinsman in the same line.[254]

Bandhus

§ 46. *Bandhus*.—(1) On failure of *sapindas* and *samanodakas*, but not until then, the inheritance passes to *bandhus*.[255]

(2) The *gotraja sapindas* and *samanodakas* of a Hindu are all agnates, that is, persons connected with him by an unbroken line of male descent. The *bandhus* or *bhinna gotra sapindas* are all cognates, that is, persons connected with him through a female or females. The *bandhus* of a person are his blood relations connected through females who have passed into other families or *gotras*.[256]

(3) Every *bandhu* must be related to the deceased through at least one female. He may, however, be related to him through two females or even more than two.[257]

Mitakshara (Chapter 2, section 6, para 1) mentions three classes of *bandhus*, namely: (1) *atma bandhus*, that is, one's own *bandhus*; (2) *pitri bandhus*, that is, the father's *bandhus*, and (3) *matri bandhus*, that is, the mother's *bandhus*, and enumerates the following nine relations as *bandhus*:—

I. Atma Bandhus

1 Father's sister's son

2 Mother's sister's son

3 Mother's brother's son

The word 'son' is used in a generic sense and includes son's son.[258]

II. Pitri Bandhus

4 Father's father's sister's son

5 Father's mother's sister's son

6 Father's mother's brother's son

III. Matri Bandhus

7 Mother's father's sister's son

8 Mother's mother's sister's son

9 Mother's mother's brother's son

Reference may be made to the undermentioned decisions as regards *bandhus* expressly mentioned in *Mitakshara*.[259]

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254 §§ 40 and 44. *Sarvadhikari's Hindu Law of Inheritance*, 2nd edition, p 687.

255 *Ram Baran v Kamla Prasad*, (1910) 32 All 594 : 6 IC 698.

256 *Vedachela v Subramania*, (1921) 48 IA 349, p 354 : 44 Mad 753 : 64 IC 402 : AIR 1922 PC 33.

257 *Krishna v Venkatarama*, (1906) 29 Mad 115; *Venkatagiri v Chandra*, (1900) 23 Mad 123; *Parot Bapalal v Mehta Harilal*, (1895) 19 Bom 631.

258 *Adit Narayan v Mahabir Prasad*, (1921) 48 IA 86 : 6 Pat LJ 140 : 60 IC 251 : AIR 1921 PC 53, where it was held that a mother's sister's son's son is an *atma bandhu*.

259 *Girdhari Lall v Bengal Government*, (1869) 12 MIA 448; *Muthusami v Simambedu*, (1896) 19 Mad 405 : 23 IA 83.

Besides the nine relations enumerated in *Mitakshara*, the following relations have been held to be *bandhus*, namely:

1. *Sister's son*[260].—Under the Hindu Law of Inheritance (Amendment) Act 2 of 1929, the sister's son inherits with *gotraja sapindas*, and succeeds next after the sister (see § 43, No 13D).
2. Half-sister's son[261] but not a sister's stepson[262]
3. Brother's daughter's son[263]
4. Daughter's son's son[264]
5. Sister's son's son[265]
6. Daughter's daughter's son[266]
7. Sister's daughter's son[267]
8. Father's sister's son's son[268]
9. Father's sister's daughter's son[269]
10. Mother's father[270]
11. Maternal uncle[271]
12. Grandfather's son's daughter's son[272]
13. Great grandfather's son's daughter's son[273]
14. Great great grandfather's son's son's daughter's son[274]
15. Father's father's father's daughter's son[275]
16. Father's father's sister's son's son[276]
17. Father's mother's brother[277]
18. Father's maternal grandfather's daughter's son[278]

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260 *Amrita Kumari v Lakhinarayan*, (1868) 2 Beng LR 28 (FB); *Chelikani v Vencata*, (1871) 6 Mad HC 278; *Raghunath v Munnan Misr*, (1898) 20 All 191.
261 *Subbaraya v Kylasa*, (1892) 15 Mad 300.
262 *Saminatha v Angammal*, (1922) 45 Mad 257 : 65 IC 736 : AIR 1922 Mad 46.
263 *Mussamutt Doorga Bibee v Janki*, (1873) 10 Beng LR 341.
264 *Krishnayya v Pichamma*, (1888) 11 Mad 287; *Sheobarat v Bhagwati*, (1895) 17 All 523; *Tirumalachariar v Andal*, (1907) 30 Mad 406.
265 *Balusami v Narayana*, (1897) 20 Mad 342.
266 *Tirumalachariar v Andal*, (1907) 30 Mad 406; *Ajudhia v Ram Sumer*, (1909) 31 All 454 : 2 IC 376; *Ramphal v Pan Mati*, (1910) 32 All 640 : 7 IC 292; *Kalimuthu v Ammamuthu*, (1934) 58 Mad 238 : 153 IC 107 : AIR 1934 Mad 611.
267 *Umaid Bahadur v Udoi Chand*, (1881) 6 Cal 119 (FB); *Sham Devi v Birbhadra Prasad*, (1921) 43 All 463 : 62 IC 432 : AIR 1921 All 178.
268 *Harihar v Ram Daur*, (1925) 47 All 172 : 82 IC 1032 : AIR 1925 All 17.
269 *Parot Bapalal v Mehta Harilal*, (1895) 19 Bom 631; *Venkatagiri v Chandru*, (1900) 23 Mad 123; *Krishna v Venkatarama*, (1906) 29 Mad 115.
270 *Chinnammal v Venkatachala*, (1892) 15 Mad 421.
271 *Muthusami v Simambedu*, (*supra*) ; *Vedachela v Subramania*, (1921) 48 IA 349 : 44 Mad 753 : 64 IC 462 : AIR 1922 PC 33.
272 *Tirath Ram v Kahan Devi*, (1920) ILR Lah 588, pp 595–96 : 60 IC 101 : AIR 1921 Lah 149.
273 *Ram Sia v Bua*, (1925) 47 All 10 : 84 IC 360 : AIR 1924 All 790; *Parmanandas v Parbhudas*, (1912) 14 Bom LR 630 : 16 IC 591.
274 *Manik Chand v Jagat Settani*, (1890) 17 Cal 518.
275 *Krishna v Venkatarama*, (1906) 29 Mad 115.
276 *Sethurama v Ponnammal*, (1889) 12 Mad 155; *Chamanlal v Ganesh*, (1904) 28 Bom 453.
277 *Girdhari Lall v Bengal Government*, (1869) 12 MIA 448.
278 *Ananda Bibee v Nownit Lal*, (1883) 9 Cal 315, p 327.

19. Mother's mother's brother's son's son[279]
20. Mother's mother's brother's daughter's son[280]
21. Mother's sister's son's son[281]
22. Mother's father's adopted son[282]
23. Mother's father's grand nephew[283]
24. Father's sister's son's daughter's son[284]
25. Mother's paternal grandfather's daughter's son's son[285]
26. Mother's paternal grandfather's son's son's son
27. Father's father's maternal grandfather's son's son.[286]

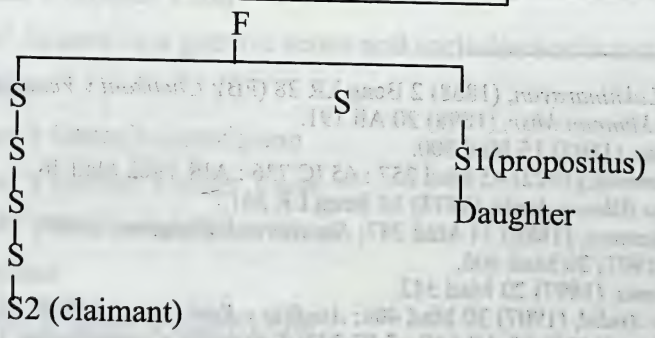
§ 47. Rules for determining heritable *bandhus*.—Are all the blood relations of a person connected through a female, heritable *bandhus* or *bhinna gotra sapindas*?

The question naturally arises whether the term '*sapinda*' in this connection, is used in the general sense (§ 36) or the narrower sense (§ 37). In other words, whether all the relations connected by community of particles of the same body (whatever the degree of relationship to and from a common ancestor may be) are entitled to inherit as *bandhus*, or only those who are connected within certain specified degrees.

In *Ramchandra v Vinayak*,[287] the judicial committee held that the term '*bandhus*' was used in *Mitakshara* 'in a restricted and technical sense'.

In that case, the relationship between the deceased and the claimant was as appears from the following table:

Table IV.2



After the death of the last male owner (S1), his daughter enjoyed the property. On her death without issue, the claimant (S2) claimed the property. He traced his relationship to the common ancestor through his mother. If the narrower sense of the term '*sapinda*' is adopted, he is beyond five degrees (vide explanation below) and he

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279 *Ratnasubbu v Ponappa*, (1882) 5 Mad 69.
280 *Babu Lal v Nanku Ram*, (1895) 22 Cal 339.
281 *Adit Narayan v Mahabir Prasad*, (1921) 48 IA 86 : 6 Pat LJ 140 : 60 IC 251 : AIR 1921 PC 53; *Bai Vijli v Bai Prabhalakshmi*, (1907) 9 Bom LR 1129.
282 *Padma Kumari v Court of Wards*, (1881) 8 IA 229 : 8 Cal 302.
283 *Supra*.
284 *Kesar Singh v Secretary of State*, (1926) 49 Mad 652 : 95 IC 651 : AIR 1926 Mad 881.
285 *Chengiah v Subbaraya*, (1930) 58 Mad LJ 562 : 128 IC 172 : AIR 1930 Mad 555.
286 *Kasa v Vinayak*, (1947) ILR Bom 770.
287 *Ramchandra v Vinayak*, (1914) 41 IA 290, p 312 : 42 Cal 384, p 420 : 25 IC 290 : AIR 1914 PC 1.

is not entitled to inherit. It was accordingly argued on his behalf that any person related through a female is a heritable *bandhu*, and there is no restriction as to degrees, it was also contended that the narrower sense of '*sapinda*' in *Mitakshara*, Chapter III, is confined to prohibition in respect of marriage and has nothing to do with inheritance. The Judicial Committee did not accept the contention.

When the claimant claims through a male, according to the restricted sense of the term '*sapinda*', he must be within seven degrees. The Allahabad and Bombay High Courts have held that, even when the claimant traces his relationship through his father, heritable *bandhuship* ceases with the fifth degree.[288] It is submitted that, in such a case, the rule of seven degree would apply.

The general conclusion arrived at in *Ramchandra v Vinayak* that 'the *sapinda* relationship, on which the heritable right of collaterals is founded, ceases in the case of the *bhinna gotra sapinda* with the fifth degree from the common ancestor',[289] is applicable only to cases where the claimant claims through his mother. This is the view of Venkatasubba Rao J in *Kesar Singh v Secretary of State for India*.[290] He said:

> I have said in the course of this judgment that in the case of *bandhus*, *sapinda* relationship ceases beyond the fifth from the mother and the seventh from the father. This is repeatedly referred to in the judgment of the judicial committee in *Ramachandra v Vinayaka*.

Explanation (i).—The five degrees, according to the Hindu mode of computation, are to be calculated from and inclusive of the deceased in the case of ascendants and descendants of the deceased, and from and inclusive of the common ancestor in the case of descendants of the common ancestor.

The father's father's son's son's daughter's daughter's son is not heritable *bandhu* for he is in the sixth degree from the common ancestor, that is, the father's father.[291]

For the same reason, the father's father's son's son's son's daughter's son is not a heritable *bandhu*;[292] so also the great great grandfather's great grandson's daughter's son is not a heritable *bandhu*.[293] In these cases, as the claimants trace their descent through their mother, the *sapinda* relationship ceases with five degrees.

Cases of claimants claiming through the fathers being more than five degrees, but not more that seven degrees, have not come up for decision before the courts. The following special cases may be noted. It is assumed that there is no difficulty as to the number of degrees on the owner's side.

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288 *Brij Mohan v Kishun Lal*, (1938) ALJ 670 : AIR 1938 All 443; *Hanmant Ramaji v Vasudeo Hanmant*, (1943) Bom 465 : 206 IC 152 : AIR 1943 Bom 89; *Kasa v Vinayak*, (1947) Bom 770.

289 *Ramchandra v Vinayak*, (1914) 41 IA 290, p 312 : 42 Cal 384, p 420 : 25 IC 290 : AIR 1914 PC 1; *Kartar Singh v Niranjan Singh*, AIR 1955 Pepsu 79.

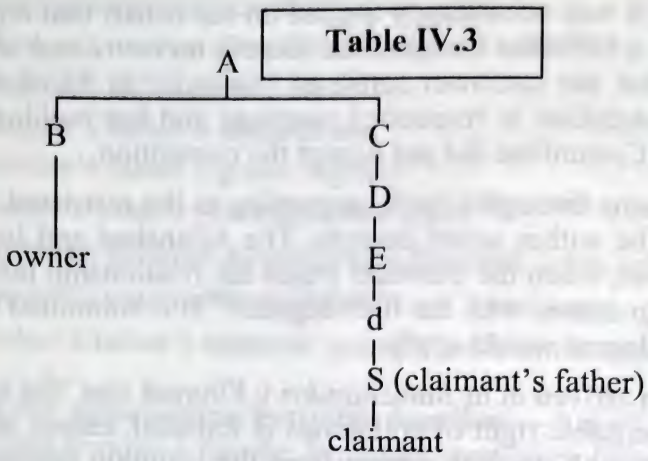
290 *Kesar Singh v Secretary of State for India*, (1926) 49 Mad 652, p 689 : 95 IC 651 : AIR 1926 Mad 881.

291 *Ramchandra Martand Waikar v Vinayak Venkatesh Kothekar*, (1914) 41 IA 290 : 42 Cal 384 25 IC 290 : AIR 1914 PC 1.

292 *Shib Sahai v Saraswati*, (1915) 37 All 583 : 30 IC 903 : AIR 1915 All 409. The decision is correct, but the mode of computation adopted in the case is, it is submitted, incorrect. This has been recognised in *Ram Sia v Bua*, (1925) 47 All 10 : 84 IC 360 : AIR 1924 All 790.

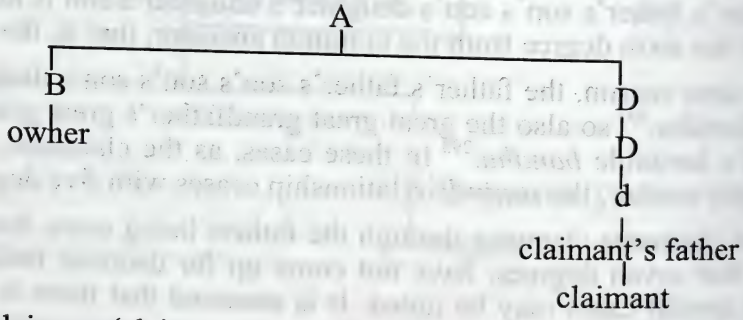
293 *Ram Parshad v Idu Mal*, (1932) 13 Lah 249 : 134 IC 122.

Table IV.3



In this case, the claimant (tracing his relationship through his father) is not more than seven degrees from the common ancestor; and may, at first sight, be regarded as a heritable *bandhu*. However, *S* (his father) who claims through his mother is more than five degrees from *A*, and is not a heritable *bandhu*. To hold that the claimant is a *bandhu* and *S*, his father, is not a heritable *bandhu*, is an anomaly. The sapindaship of the claimant in such a case is described as a sapindaship by frog's leap.[294] He is not a heritable *bandhu*.

Table IV.4



In this case, the claimant (claiming through his father) is within seven degrees. His father (claiming through his mother) is not beyond five degrees. Both are heritable *bandhus*.

Explanation (ii).—'In order to entitle a man to succeed to the inheritance of another, he must be so related to the latter that they are *sapindas* of each other';[295] in other words, the right of inheritance accrues to a *bandhu*, if the late owner and the person claiming the inheritance were related as *sapindas* to each other.

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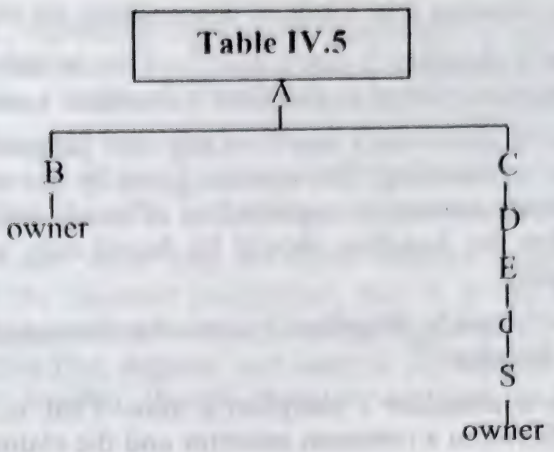
294 *Dr Sarvadhikari's Principles of Hindu Law*, 2nd edition, p 592.

295 *Ramchandra v Vinayak*, (1914) 41 IA 290, 312 : 42 Cal 384 : 25 IC 290 : AIR 1914 PC 1; *Umaid Bahadur v Udai Chand*, (1881) 6 Cal 119 (FB); *Babu Lal v Nanku Ram*, (1895) 22 Cal 339.



Due to the principle of mutuality, the diagrams in the preceding rule will hold good, if the owner and claimant are interchanged. Thus, the first diagram becomes the accompanying diagram, by the principle of mutuality. Just as the claimant in Table IV.3 is a *sapinda* by frog's leap and is not a heritable *bandhu*, similarly, the owner in Table IV.5 is a *sapinda* by frog's leap and is not a heritable *bandhu* of the claimant. Therefore, by the rule mentioned in this paragraph, the claimant is not a heritable *bandhu* of the owner.

However, if the interchange is made in Table IV.4, the result is that the owner is a heritable *bandhu* of the claimant. Therefore, the claimant is also a heritable *bandhu* of the owner.

Explanation (iii).—Is there any other principle limiting heritable *bandhus*? There are two views on this matter.

(a) Dr Sarvadhikari, noticing the fact that the nine *bandhus* enumerated in *Mitakshara* are descendants from common ancestors, who are members of the following four families, namely:

- the family of the propositus and his agnate ancestors, e.g., one's father's sister's son, one's father's father's sister's son;
- the family of the mother's agnate ancestors, e.g., one's mother's sister's son, one's mother's brother's son, one's mother's father's sister's son;
- the family of the father's mother's agnate ancestors, e.g., one's father's mother's sister's son and one's father's mother's brother's son;
- the family of the mother's mother's agnate ancestors, e.g., one's mother's mother's sister's son and one's mother's mother's brother's son,

In addition, applying the principle of mutuality infers that the propositus must be a descendant of a common ancestor, who is a member of the following families, namely; (i) claimant's agnate family; (ii) claimant's mother's agnate family; (iii) claimant's father's mother's agnate family; (iv) claimant's mother's mother's agnate family, this is to say, the claimant must be either:

(a) a member of the families 2, 3, 4; or
(b) a daughter's son; or
(c) a daughter's son's son; or
(d) a daughter's daughter's son.

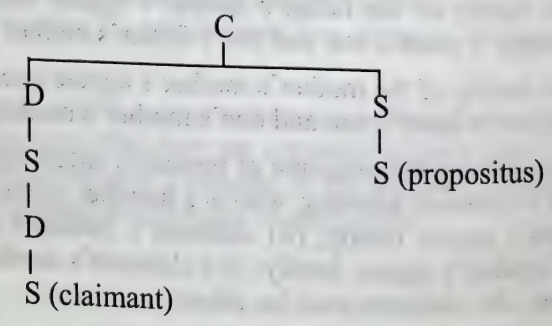
} of an agnate member of the four families 1, 2, 3 and 4.

Accordingly, the following four kinds of descendants are excluded:

1. *Daughter's daughter's son's son*[296]—This is only an *obiter dictum*. The actual decision related to daughter's daughter's son.
2. *Daughter's son's son's son*[297]—Only one judgment is based on Dr Sarvadhikari's reasoning. The reasons given by the other judge are different. The decision cannot be regarded as of much weight.[298] The decision assumes that the *bandhus* should be found only in the above-mentioned four families.
3. *Daughter's son's daughter's son*—As discussed in *Gajadhar Prasad v Gauri Shankar*.[299]
4. *Daughter's daughter's daughter's son*—That is, there cannot be three females between a common ancestor and the claimant or the propositus.

(b) According to the second view, *Mitakshara* merely enumerates the first cousins of the *propositus*, of his father and his mother. It was not intended to limit heritable *bandhuship* to particular individuals or to descendants of particular families, or to certain kinds of descendants in these families. None of the ancient texts support such limitation. The definition of a *bandhu* as a *bhinna gotra sapinda*, even adopting the narrower meaning of the term '*sapinda*', does not involve such limitation. The judicial committee has held (§ 46) that the enumeration of the *bandhus* in *Mitakshara* is not exhaustive. Then why should one infer by implication that the families in which *bandhus* are to be found—families not mentioned as such by Vijnaneshwara—are exhausted by the enumeration of the *bandhus*? Similarly, why should the enumeration be considered exhaustive as to the type of descendants in these families? Accordingly, it was held in *Kesar Singh v Secretary of State*, by the High Court of Madras, that the father's father's daughter's son's daughter's son was a heritable *bandhu*.[300] The following table explains the relationship of the claimant with the *propositus* in that case:

Table IV.6

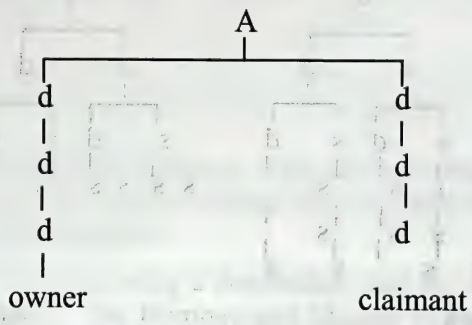


296 *Umaid Bahadur v Udai Chand*, (1880) 6 Cal 119.
297 *Chinna Pichu v Padmanabha*, (1921) 44 Mad 121 : 59 IC 690 : AIR 1921 Mad 671.
298 *Lowji v Mithabai*, (1900) 2 Bom LR 842.
299 *Gajadhar Prasad v Gauri Shankar*, (1932) 54 All 698 : 138 IC 561 : AIR 1932 All 417.
300 *Kesar Singh v Secretary of State*, (1926) 49 Mad 652 : 95 IC 651 : AIR 1926 Mad 881.

In the above table, *C* represents the common ancestor. *S* represents the son and *D* the daughter. Here the claimant claims relationship through his mother and is fifth in descent from the common ancestor *C*. The *propositus* traces relationship through his father and is third in descent from the common ancestor *C*, that is, within seven degrees from him. The test of degree is thus satisfied. Upon the same facts, the test of mutuality is also satisfied. No other test of limitation is essential.

According to this view, there may be three females intervening between the common ancestor and the claimant *propositus*, that is, in the line of ascent or line of descent. For example, in the accompanying Table IV.7, the owner and the claimant are each within five degrees and each is *sapinda* of the other. Here, the claimant is a heritable *bandhu*, though there are six females intervening between him and the owner.

Table IV.7



The 'line theory' of Dr Sarvadhikari has been rejected by a Full Bench of the Madras High Court in *Seelam Nagamma v Reddam*,[301] and the decision of the Allahabad Full Bench in *Gajadhar v Gauri Shankar*,[302] has been expressly dissented from. The same view has been taken by the Calcutta High Court in *Panchu Gopal v Bata Mall*,[303] and by the Bombay High Court in *Kasa v Vinayak*.[304] The view propounded by Dr Sarvadhikari thus appears to be unsupportable.

§ 48. Who are heritable *bandhus*.—We are now in a position to enumerate the heritable *bandhus* whichever view—that of Madras or Allahabad—ultimately prevails. In each particular case, it is enough to see: (1) whether he is a *sapinda* in a narrower sense; and (2) whether there is mutuality between the owner and the claimant. If the Madras view prevails, all other conditions are immaterial. If the Allahabad view is accepted, (3) he must belong to one of the four types of descendants and he must be descended from an agnate member of any of the four families[305] and must be within five degrees of the common ancestor. The last clause also represents the Bombay view.

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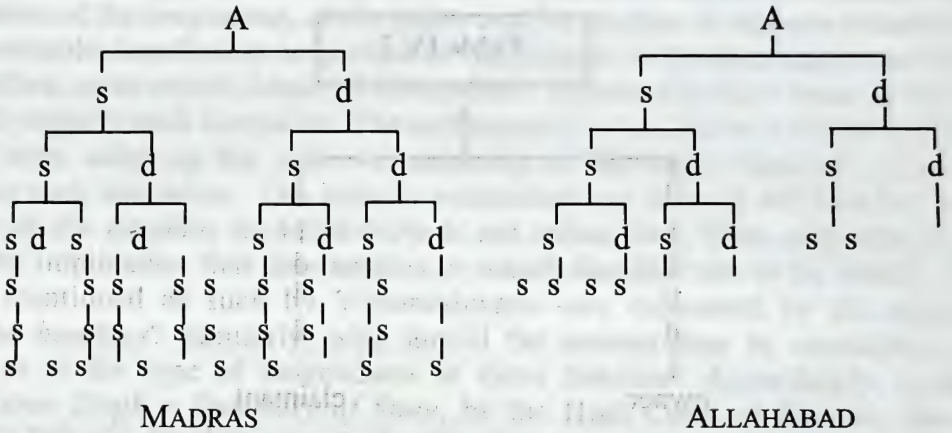
301 *Seelam Nagamma v Reddam*, (1943) Mad 759 (FB).
302 *Gajadhar v Gauri Shankar*, (1932) 54 All 698 : AIR 1932 All 417.
303 *Panchu Gopal v Bata Mall*, AIR 1949 Cal 157.
304 *Kasa v Vinayak*, (1947) Bom 770.
305 *Gajadhar Prasad v Gauri Shankar*, (*supra*).

In Table IV.8, the males are all *bandhus* of the *propositus*, *A* being a cognate ancestor of his descendants.

In the diagrams, *sapindas* by frog's leap are excluded. *A*'s daughter's son's daughter's son shown in the Madras diagram was recognised in *Kesar Singh*'s case[306] but not in *Gajadhar v Gauri Shankar.*[307] *A*'s son's son's daughter's son's son shown in the Madras diagram was not held to be an heir in *Brij Mohan v Kishun Lal.*[308]

If *A* is an agnate ancestor of the owner, all the s's descendants on the extreme left are *gotraja sapindas*. The others are *bandhus*.

Table IV.8



§ 49. Three classes of *bandhus*.—The three classes of bandhus have already been mentioned (§ 46).

Atma bandhus may be subdivided into:

1 owner's cognate descendants;

2 father's cognate descendants; of these

3 the sister's son has gone higher up by legislation;

4 cognate descendants of father's father, and mother's father and his descendants, and ancestor and collaterals.

Pitri bandhus may be subdivided into:

1 father's father's father's cognate descendants;

2 father's mother's father's and his descendants;

Matri bandhus may be subdivided into:

1 mother's father's father and his descendants;

2 mother's mother's father and his descendants.

All the above *bandhus* should satisfy the limit of degrees.

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306 *Kesar Singh v Secretary of State,* (1926) 49 Mad 652 : 95 IC 651 : AIR 1926 Mad 881.
307 *Gajadhar v Gauri Shankar,* (*supra*).
308 *Brij Mohan v Kishun Lal,* (1938) ALJ 670 : AIR 1938 All 443.

§ 50. Rules for determining order of succession among male *bandhus*—First rule laid down by the Judicial Committee.—In *Muthusami v Muthukumarasami*,[309] the claimants were: (1) mother's half-brother; and (2) father's father's sister's son. The Madras High Court in the course of the judgment[310] laid down four propositions. The first proposition defines *bandhu*. The second proposition lays down that the three classes, *atma bandhus*, *pitri bandhus* and *matri bandhus* succeed in the order in which they are named. Accordingly, the mother's half brother who was an *atma bandhu* was preferred to the rival claimants who were *pitri bandhus*. This judgment was affirmed by the Privy Council. Thus, the first rule we get relating to the order of succession among the *bandhus* is: (1) *atma bandhus* (one's own *bandhus*) succeed before *pitri bandhus* (father's *bandhus*); and (2) *pitri bandhus* succeed before *matri bandhus* (mother's *bandhus*).

Illustrations

(a) The mother's father's daughter's son's son (mother's sister's grandson), (§ 54, no 25), being an *atma bandhu*, is entitled to succeed in priority to the mother's father's father's daughter's son (mother's paternal aunt's son) (§ 54, no 6) who is a *matri bandhu*.[311]

(b) Father's sister's daughter's son being an *atma bandhu* is entitled to succeed in priority to paternal grandfather's sister's son, who is a *pitri bandhu*.[312]

It is important to note, as observed by the Privy Council, that rule (1) is not dependent on individual propinquity or on the efficacy of offerings to the deceased.[313]

§ 50A. Descendants preferred to those who are not descendants.—We have seen (§ 49) that *atma bandhus,* may be divided into: (1) descendants of the *propositus*; (2) those who are not descendants.

No case of rival claimants, one being a descendant and the other not, has come up before the Judicial Committee. The Bombay and Madras High Courts have held that the descendants of the *propositus* are entitled to preference over those who are not descendants. In *Dattatraya v Gangabai*,[314] the rival claimants were a son's daughter's son and the father's daughter's daughter. The claim of the latter would be disallowed in Madras on the ground that all female *bandhus* rank after male *bandhus*, and in any other state, on the ground that no female *bandhus* are recognised. However, this ground for rejecting the claim is not available in Bombay, where female *bandhus* are recognised (§ 56). The sister's daughter's claim was rejected on the ground that she was a collateral, her rival claimant being a descendant of the *propositus*. In a Madras case, in which the succession opened before the passing of Act II of 1929, the rival claimants were: (1) daughter's daughter's son; and (2) sister's son. It was held that the former was entitled to preference.[315]

§ 51. Second and third rules laid down by the Judicial Committee.—In *Vedachela v Subramanian*[316] the claimants were: (1) a maternal uncle (appellant); and (2)

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309 *Muthusami v Muthukumarasami,* (1893) 16 Mad 23.
310 *Muttusami v Muttukumarasami*, (*supra*).
311 *Adit Narayan v Mahabir Prasad,* (1921) 48 IA 86 : 6 Pat LJ 140 : 60 IC 251 : AIR 1921 PC 53.
312 *Krishna Ayyangar v Venkatarama Ayyangar,* (1906) 29 Mad 115.
313 *Adit Narayan v Mahabir Prasad,* (1921) 48 IA 86, 95 : 60 IC 251 : AIR 1921 PC 53.
314 *Dattatraya v Gangabai,* (1922) 46 Bom 541 : 77 IC 17 : AIR 1922 Bom 321.
315 *Kalimuthu v Ammamuthu,* (1935) 58 Mad 238 : 153 IC 107 : AIR 1934 Mad 611.
316 *Vedachela v Subramanian,* (1921) 48 IA 349, p 364 : 44 Mad 753, p 767 : 64 IC 402 : AIR 1922 PC 33; *Laxman v Gangabai*, AIR 1955 MB 138.

a paternal aunt's son's son (respondent). The Madras High Court held that the latter who is a *bandhu ex parte paterna* was entitled to succeed in preference to the former who was a *bandhu ex parte materna*. On appeal, the judicial committee reversed the judgment of the High Court. Their Lordships observed:

> In the absence of any express authority varying the rule, the propositions enunciated in *Muttusami v Muttukumarasami*,[317] which on appeal was affirmed by the Judicial Committee,[318] furnish a safe guide.

Reference may also be made to *Gowardhan v Dwarku*, where a half brother of the mother was preferred to a father's brother's daughter.[319]

The first two propositions have been already stated (§ 50). The next two propositions are:

(3) That the examples given therein are intended to show the mode in which nearness of affinity is to be ascertained;

(4) That as between *bandhus* of the same class, the spiritual benefit they confer upon the *propositus* is, as stated in the *Viramitrodaya*, a ground of preference.

In *Jatindranath Ray v Nagendranath Ray*,[320] in which the parties were governed by the Benares School of *Mitakshara*, the contest was between the mother's sister's son and the father's half-sister's son, both *atma bandhus* and the latter was preferred to the former on the ground of the superior spiritual efficacy of the *pinda* offered by him. In that case, their Lordships of the Privy Council observed as follows:

> No doubt, propinquity in blood is the primary test, but...the Viramitrodaya brings in the conferring of spiritual benefits as the measure of propinquity where the degree of blood relationship furnishes no certain guide.

From the above two cases, we get the following rules:

(i) propinquity in blood or nearness in degree gives a ground of preference;[321]

(ii) when it fails (and not until then), the conferring of spiritual benefit is a ground of preference.[322]

It looks as if the phrases 'nearness in degree', 'propinquity in blood', and 'degree of blood relationship' are used in the ordinary sense of the steps between the claimant and the *propositus* and not in the technical sense of ancient Hindu lawyers. If so, the decision noted below is also an obvious case.[323]

Spiritual efficacy as a ground of preference among bandhus.—In the last mentioned case, their Lordships observed:[324]

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317 *Muttusami v Muttukumarasami,* (1893) 16 Mad 23, p 30.

318 *Muthuswami v Sunambedu*, (1896) 23 IA 83 : 19 Mad 405; *Chengiah v Subbaraya*, (1930) 58 Mad LJ 562 : 128 IC 172 : AIR 1930 Mad 555, where the rival claimants are both *matri bandhus*.

319 *Gowardhan v Dwarku,* AIR 1963 Punj 398.

320 *Jatindranath Ray v Nagendranath Ray,* (1932) 59 Cal 576 : 58 IA 372 : 135 IC 637 : AIR 1931 PC 268; *Kaliammal v Muthu Pillai,* AIR 1966 Mad 118.

321 *Balasubramanya Pandya Thalaivar v Subbayya Thevar*, (1938) 65 IA 93 : (1938) Mad 551 : 40 Bom LR 704 : 172 IC 724 : AIR 1938 PC 34; *Debi Das v Mukat Behari Lal*, (1943) All 31 : 207 IC 17 : AIR 1943 All 177 (an obvious case).

322 *Ademma v Hanuman Reddi*, (1938) Mad 260 : AIR 1937 Mad 967.

323 *Sobadra v Shri Thakur Behariji Maharaj*, (1943) All 155 : 206 IC 81 : AIR 1943 All 87.

324 *Jatindranath Ray v Nagendranath Ray*, (1932) 59 Cal 576, p 584 : 58 IA 372 : 135 IC 637 : AIR 1931 PC 268, 271.

Applying it to the parties in the present appeal, it is obvious that the respondents offer the full cake to the paternal grandfather and great grandfather of the *propositus*, while the appellant offers it to his maternal grandfather, great grandfather and great great grandfather. Thus, no doubt the appellant offers three cakes and the respondents only two. However, the *propositus* participates only in oblations made to his three immediate paternal ancestors and not in those made to his maternal ancestors.[325] .Apart from this, it seems to be well established that cakes offered to the paternal ancestors are of superior efficacy to those offered to maternal ancestors. This was laid down by a Full Bench of the Calcutta High Court in *Guru Gobind Shaha Mandal v Anand Lal Ghose Mazumdar.*[326] Their Lordships must, therefore, hold that the offerings made by the respondents confer a greater spiritual benefit upon the *propositus* than those made by the appellant, and that, taking this as a measure of propinquity, the respondents must be held to be the preferential heirs.

§ 52. Fourth rule laid down by the Judicial Committee.—*Bandhus ex parte paterna and bandhus ex parte materna.*—It has been held by the High Courts of Madras[327] and Bombay,[328] that *bandhus ex parte paterna* (i.e., on the father's side), take before *bandhus ex parte materna* (i.e., on the mother's side). The fourth rule approved by the Judicial Committee is that *bandhus ex parte paterna* are preferred to *bandhus ex parte materna*. This rule must be applied only after the first three rules fail to furnish a guide.

In *Vedachela*'s case,[329] the Judicial Committee disapproved of the application of the rule where a different result would follow by reason of nearness in degree or superior efficacy. In the case of such a conflict, the rule in this section ought not to be applied: where there is no such conflict, or where the other rules fail to furnish a guide, this rule may be applied. This is how the decision in *Balusami v Narayana*[330] was distinguished by the judicial committee.[331] There is nothing in the judgment of the judicial committee in that case to suggest that the rule of preference for *bandhus ex parte paterna* is not applied in any case. On the contrary, in *Jatindranath Ray v Nagendranath Ray*,[332] which was governed by the Benares School of Hindu law, their Lordships observed that the rule was supported by a considerable volume of authority, such as Mayne,[333] and Gopalchandra Sarkar,[334] who lay down the rule that as between *bandhus* of the same class and equal in degree, one related on the father's side is to be preferred to one related on the mother's side. Also *Bhattacharya's Commentaries* seems to have taken the same view.[335] The contest in *Jatindranath Ray*'s case was between the father's half-sister's son and the mother's sister's son. Both were *atma bandhus* in equal degree of propinquity to the last owner. The father's half-sister's son was entitled to succeed in preference to the mother's sister's

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325 *Sarvadhikari's Principles of Hindu Law*, 1st edition, pp 817–18.

326 *Guru Gobind Shaha Mandal v Anand Lal Ghose Mazumdar*, (1870) 5 Beng LR 15, p 39 : 13 WR 49 (FB).

327 *Sundrammal v Rangasami*, (1895) 18 Mad 193; *Balusami v Narayana*, (1897) 20 Mad 342.

328 *Saguna v Sadashiv*, (1902) 26 Bom 710, p 715.

329 *AS Vedachela Mudatiar v Subramania Chettiar*, (1922) 48 IA 349 : 44 Mad 753 : 64 IC 402 : AIR 1922 PC 33.

330 *Balusami v Narayana*, (1897) 20 Mad 342.

331 *AS Vedachela Mudatiar v Subramania Chettiar*, (*supra*).

332 *Jatindranath Ray v Nagendranath Ray*, (1931) 58 IA 372 : 59 Cal 576 : 135 IC 637 : AIR 1931 PC 268.

333 Mayne, *Hindu Law*, 9th edition, section 579.

334 Gopalchandra Sarkar, *Hindu Law*, 7th edition, p 574.

335 *Hindu Law*, 2nd edition, p 460.

son, if the rule of preference of *bandhus ex parte paterna* were to be applied. He was also entitled to succeed if the test of spiritual efficacy were adopted. Their Lordships, however, thought that 'the safer test' was that of spiritual efficacy, and decided on that ground in favour of the father's half-sister's son.

In the light of the two decisions of judicial committee, the decision of the Madras High Court in *Sundarammal v Rangasami*,[336] is open to the comment that it did not give proper effect to the propositions enunciated in *Muthusami*'s case referred to in §§ 50 and 51. However, the decision in *Balusami v Narayana*,[337] is still good law. The actual decision was arrived at by the application of the principles: (1) the nearer line excludes the more remote; and (2) *bandhus ex parte paterna* are preferred to the *bandhus ex parte materna*. Neither comparison of degrees nor spiritual efficacy gives a different result. It is submitted that the decision is correct though different reasons might have been given.

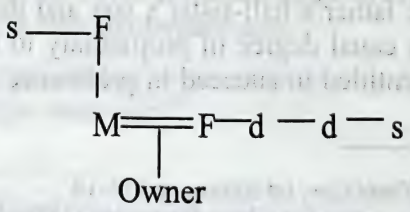
§ 53. Additional rules laid down by the High Courts.—Leaving the case of descendants as settled for all practical purposes (§ 50A), on the principle that the nearer line excludes the more remote, the further question arises whether it can be applied as between collaterals of different lines. The question is of great practical importance and may frequently arise, among *atma bandhus*.

We have already seen (§ 49) that *atma bandhus*, who are not descendants, may be divided into; (1) father's cognate descendants or father's line;

(2) maternal grandfather and descendants of maternal and paternal grandfathers. The lines of grandfathers, being equal in degree, may be regarded as one line.

When the rival claimants belong to these two different lines, the question arises whether the principle that the nearer line excludes the more remote applies to them. Where the claimants are equally removed from the *propositus*, it is reasonable that the rule should apply. However, it may be possible that the claimant in the nearer line is more remotely removed than the claimant in the remoter line as in the following table:

Table IV.9



In such a case who is the preferable heir? Though the actual point has not arisen before the Madras High Court, the trend of the decisions is in favour of holding that the nearer line excludes the more remote.[338]

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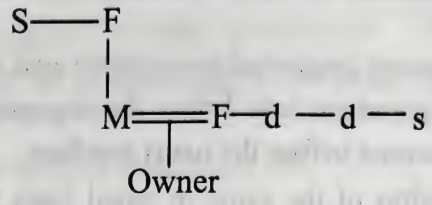
336 *Sundarammal v Rangasami*, (1895) 18 Mad 193.

337 *Balusami v Narayana*, (1897) 20 Mad 342.

338 *Balusami v Narayana*, (1897) 20 Mad 342; *Kalimuthu v Ammamuthu*, (1935) 58 Mad 238, p 246 : 153 IC 107 : AIR 1934 Mad 611.

A contrary decision has been arrived at by the Patna High Court, where the rival claimants were related as in the following table:

Table IV.10



It was held by a majority of three, that the maternal uncle is entitled to succeed.[339] The point has not arisen before the judicial committee or the other High Courts. The Allahabad High Court has touched upon it but left it open, as it did not arise for decision.[340]

All other considerations being equal, the claimant who is separated by only one female link is to be preferred to one who is separated by two such links.[341] Another mode of expressing it is that two steps in cognateness are inferior to only one step in cognateness and one in agnateness.[342]

It has thus been held that a daughter's son's son is to be preferred to a daughter's daughter's son.[343] The mother's brother's son is preferred to mother's sister's son in Madras[344] and Allahabad.[345] The Bombay High Court refused to follow the above rule and held that both were entitled to take equally.[346] The decision seems to be of doubtful authority, and, it is submitted, requires reconsideration. If it is supported on any doctrine peculiar to Bombay, it has to be confined to Bombay. Following the same rule, it has been held by the High Court of Allahabad,[347] that the father's father's daughter's son's son (§ 54) is to be preferred to the father's daughter's daughter's son (§ 54, No 7). It is submitted that this case was erroneously decided. It was decided before the decisions of the Judicial Committee in *Vedachela v Subramania*[348] and *Jatindranath Ray v Nagendranath Ray.*[349] The rule in this paragraph should not be applied before the earlier rules have been tested.

Only when they fail to furnish a guide, should we proceed to this rule. If we apply the test of nearness in degree, laid down by the judicial committee, the result would be different.

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339 *Umashankar v Mst Nageshwari*, (1918) 3 Pat LJ 663 : 48 IC 625 : AIR 1918 Pat 1.
340 *Sobadra v Shri Thakur Behariji Maharaj*, (1942) ALJ 732 : (1943) All 55 : 206 IC 81 : AIR 1943 All 87.
341 *Tirumalachariar v Andal Ammal*, (1907) 30 Mad 406.
342 *Rami Reddy v Gangireddi*, (1925) 48 Mad 722 : 87 IC 609 : AIR 1925 Mad 807.
343 *Tirumalachariar v Andal Ammal*, (*supra*).
344 *Rami Reddy v Gangireddi*, (1925) 48 Mad 722 : 87 IC 609 : AIR 1925 Mad 807; *Appandai v Bagubali*, (1910) 33 Mad 439 : 5 IC 280, must be regarded as overruled.
345 *Ram Charan Lal v Rahim Baksh*, (1916) 38 All 416 : 34 IC 108 : AIR 1917 All 486.
346 *Rajappa v Gangappa*, (1923) 47 Bom 48 : 77 IC 219 : AIR 1922 Bom 420.
347 *Sham Devi v Birbhadra Prashad*, (1921) 43 All 463 : 62 IC 432 : AIR 1921 All 178.
348 *Vedachela v Subramania*, (1922) 48 IA 349 : 44 Mad 753 : 64 IC 402 : AIR 1922 PC 33.
349 *Jatindranath Ray v Nagendranath Ray*, (1931) 58 IA 372 : 59 Cal 576 : 135 IC 637 : AIR 1931 PC 268.

§ 53A. A sum-up of the rules.—A summing up of the rules as to the order of succession among the male *bandhus* has been attempted by the Madras High Court.[350] They are to be applied in the order in which they are stated.

1. *Atma bandhus* succeed in preference to *pitri bandhus* and *matri bandhus*.

2.&3. Among *atma bandhus*, the nearer line excludes the more remote. This is sub-divided into:

   (i) descendants are preferred to ancestors and collaterals;

   (ii) father's descendants take before the descendants of grandfathers.

4. *Pitri bandhus* succeed before the matri bandhus.

5. Among the *bandhus* of the same or equal lines, the nearer excludes the more remote. If rule 5 is to be applied before rule 3, the decision in *Uma Shankar v Nageshvari*[351] (*vide* section 53) would be correct. However, if rule 3 is to be first applied, it is incorrect.

6. If the rule of nearness in blood fails to furnish a guide, he who confers a superior spiritual benefit is preferable to one who confers an inferior spiritual benefit or none.

7. When all the above rules do not work, *bandhus ex parte paterna* are preferred to *bandhus ex parte materna*.

8. All other things being equal, a claimant who is related to the *propositus* through the intervention of two females, is to be postponed to one who is related through the intervention of only one female.

§ 53B. The last rule laid down by the Judicial Committee.—Where we come to two equal claimants after the application of the above rules, one of them is of whole blood and the other is of half-blood, the former is preferred to the latter.[352]

§ 54. Order of succession among *bandhus*.—The following is the order of succession among *bandhus* (see Table titled "Order of Succession among Bhandus"), based on rules in §§ 50–53A. attached *infra*.

I. *Atma bandhus*

Descendants

1. Son's daughter's son

   Preferred in Bombay to father's daughter's daughter, on the principle that both being equally removed from the deceased, the one in the direct line of descent should be preferred to the one in a collateral line (§ 50A)

2. Daughter's son's son (inferior to 1 in spiritual benefit)

   Preferred by the Madras High Court to No 3[§ 53(2)]

3. Daughter's daughter's son

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350 *Kalimuthu v Ammamuthu*, (1935) 58 Mad 238, p 246 : 153 IC 107 : AIR 1934 Mad 611.
351 *Uma Shankar v Nageshvari*, (1918) 3 Pat LJ 663 : 48 IC 625 : AIR 1918 Pat 1.
352 *Jatindranath Ray v Nagendranath Ray*, (1931) 58 IA 372 : 59 Cal 576 : 135 IC 637 : AIR 1931 PC 268.

Preferred by the Madras High Court to sister's son in a case before the Act of 1929,[353] and therefore, preferable to No 4

4. Lower descendants are not of practical importance

Father's descendants

5. Father's son's (=brother's) daughter's son
6. Father's daughter's (=sister's) son's son

   Preferred by the Madras High Court to no 18[354] and by the Allahabad High Court to no 27[355]
7. Father's daughter's daughter's son

   Preferred by the Allahabad High Court to no 20[356]
8. Father's son's son's daughter's son
9. Father's son's daughter's son's son

*10. Father's daughter's son's son's son

11. Father's son's daughter's daughter's son

*12. Father's daughter's son's daughter's son

*13. Father's daughter's daughter's son's son

*14. Father's daughter's daughter's daughter's son

14A. Lower descendants of father who are bandhus in Madras but not in Allahabad

15. Mother's father (=maternal grandfather)

Descendants of Grandfather

16. Mother's father's son (=maternal uncle)

    He succeeds before no 17[357] and before no 19[358]
17. Father's father's daughter's (=father's sister's or half-sisters) son

    He succeeds before no 18[359] and before no 19 (§ 51)
18. Mother's father's son's son

    He succeeds before no 19. (The decision in Bombay, holding that both take equally is either doubtful or must be limited to Bombay (§ 53)
19. Mother's father's daughter's son

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353 *Kalimuthu v Ammamuthu*, (1935) 58 Mad 238 : 153 IC 107 : AIR 1934 Mad 611.
354 *Balusami v Narayana*, (1897) 20 Mad 342, p 348.
355 *Debi Das v Mukat Behari Lal*, (1943) All 131 : 207 IC 17 : AIR 1943 All 177.
356 *Sabodra v Shri Behariji Moharaji*, (1943) All 155 : 206 IC 81 : AIR 1943 All 87. See also the decision of the Chief Court of Karachi in *Tejumal v Mulchand*, (1946) ILR Kant 467.
357 *Balasubrahamanya Pandya Thalaivar v Subbayya Tevar*, (1938) 65 IA 93 : (1938) ILR Mad 551 : 40 Bom LR 704 : 172 IC 724 : AIR 1938 PC 34; *Sakharam v Balakrishna*, (1925) 49 Bom 739 : 94 IC 817 : AIR 1925 Bom 451 must be regarded as overruled *Virangauda Lingangauda v Yelappa Shidappa*, (1943) Bom 259 : 205 IC 328 : AIR 1943 Bom 56.
358 *Mohandas v Krishnabai*, (1881) 5 Bom 597.
359 *Ademma v Hanuman Reddi*, (1938) Mad 260 : AIR 1937 Mad 967.

20. Father's father's son's daughter's son[360]
21. Mother's father's son's son's son
22. Mother's father's son's daughter's son
23. Father's father's daughter's son's son

    It is submitted that the decision in *Sham Devi v Birbhadra Prasad* is erroneous (§ 53)[361]
24. Father's father's daughter's daughter's son
25. Mother's father's daughter's son's son
26. Mother's father's daughter's daughter's son
27. Father's father's son's son's daughter's son

In *Pichandi v E Ramaswami*, the competing heirs were father's father's son's son's daughter's son and the second husband's son of the mother of the *propositus* and the latter was preferred.[362]

28. Mother's father's sons's son's daughter's son
29. Father's father's son's daughter's son's son
*30. Father's father's daughter's son's son's son
31. Father's father's son's daughter's daughter's son
*32. Father's father's daughter's son's daughter's son
*33. Father's father's daughter's daughter's son's son
*34. Father's father's daughter's daughter's daughter's son
*35. Mother's father's son's son's son's son
36. Mother's father's son's daughter's son's son
*37. Mother's father's daughter's son's son's son
38. Mother's father's son's daughter's daughter's son
*39. Mother's father's daughter's son's daughter's son
*40. Mother's father's daughter's daughter's son's son
*41. Mother's father's daughter's daughter's daughter's son
42. Father's father's son's son's daughter's son's son
*43. Father's father's son's daughter's son's son's son
*44. Father's father's daughter's son's son's son's son
*45. Father's father's son's daughter's daughter's son's son

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360 The decision in *Sundrammal v Rangasami*, (1895) 18 Mad 193 must be regarded as overruled. Reference may be made to *Kalimmal v Muthu Pillai*, AIR 1966 Mad 118, where it is pointed out that in *Madras*, a male *bandhu* is entitled to preference over a female *bandhu*, even though the female *bandhu* is nearer in degree (see the entries in that case).

361 *United Provinces Through Deputy Commissioner Hardoi v Kanhaiyalal*, (1941) 16 Luck 551 : 192 IC 131 : AIR 1941 Ori 337 : (1921) 43 All 463.

362 *Pichandi v E Ramaswami*, AIR 1971 Mad 204.

46. Father's father's daughter's son's daughter's son's son
*47. Father's father's daughter's daughter's son's son's son
*48. Father's father's daughter's daughter's daughter's son's son
*49. Mother's father's son's son's son's son's son
50. Mother's father's son's son's daughter's son's son
*51. Mother's father's son's daughter's son's son's son
*52. Mother's father's daughter's son's son's son's son
*53. Mother's father's son's daughter's daughter's son's son
54. Mother's father's daughter's son's daughter's son's son
*55. Mother's father's daughter's daughter's son's son's son
*56. Mother's father's daughter's daughter's daughter's son's son
*56A. Seven descendants of father's father, a degree lower (sons of nos 42–48)
*56B. Eight descendants of mother's father, a degree lower (sons of nos 49–56).

*These are held to be heirs in Madras, but are held not to be heirs in Allahabad according to *Gajadhar Prasad*'s case.

According to the Patna view, no 15 will come between no 3 and no 4, no 16 between no 5 and no 6, nos 17, 18 and 19 between no 8 and no 9.

Number 28 is placed above nos 29 to 35 on account of his spiritual efficacy. It must be admitted that the result is highly anomalous. It is futile to discuss it unless the case actually arises.

II. *Pitri Bandhus*

1. Father's maternal grandfather
2. Father's maternal grandfather's son
3. Father's paternal grandfather's daughter's son
4. Father's maternal grandfather's son's son
5. Father's maternal grandfather's daughter's son
6. Father's paternal grandfather's son's daughter's son
7. Father's paternal grandfather's daughter's son's son
8. Father's maternal grandfather's son's son's son
9. Father's paternal grandfather's daughter's daughter's son
10. Father's maternal grandfather's son's daughter's son
11. Father's maternal grandfather's daughter's son's son
12. Father's maternal grandfather's daughter's daughter's son
13. Father's paternal grandfather's son's son's daughter's son
14. Father's paternal grandfather's son's daughter's son's son
15. Father's paternal grandfather's daughter's son's son's son

16. Father's maternal grandfather's son's son's son's son
17. Father's paternal grandfather's son's daughter's daughter's son
18. Father's paternal grandfather's daughter's son's daughter's son
19. Father's paternal grandfather's daughter's daughter's son's son
20. Father's maternal grandfather's son's son's daughter's son
21. Father's maternal grandfather's son's daughter's son's son
22. Father's maternal grandfather's daughter's son's son's son
23. Father's paternal grandfather's daughter's daughter's daughter's son
24. Father's maternal grandfather's son's daughter's daughter's son
25. Father's maternal grandfather's daughter's son's daughter's son
26. Father's maternal grandfather's daughter's daughter's son's son
27. Father's maternal grandfather's daughter's daughter's daughter's son
28. Father's paternal grandfather's son's son's daughter's son's son
29. Father's paternal grandfather's son's daughter's son's son's son
30. Father's paternal grandfather's daughter's son's son's son's son
31. Father's maternal grandfather's son's son's son's son's son
32. Father's paternal grandfather's son's daughter's daughter's son's son
33. Father's paternal grandfather's daughter's son's daughter's son's son
34. Father's paternal grandfather's daughter's daughter's son's son's son
35. Father's maternal grandfather's son's son's daughter's son's son
36. Father's maternal grandfather's son's daughter's son's son's son
37. Father's maternal grandfather's daughter's son's son's son
38. Father's paternal grandfather's daughter's daughter's son's son
39. Father's maternal grandfather's son's daughter's daughter's son's son
40. Father's maternal grandfather's daughter's son's daughter's son's son
41. Father's maternal grandfather's daughter's daughter's son's son's son
42. Father's maternal grandfather's daughter's daughter's daughter's son's son
43. Father's paternal grandfather's son's son's daughter's son's son's son
44. Father's paternal grandfather's son's daughter's son's son's son's son
45. Father's paternal grandfather's daughter's son's son's son's son's son
46. Father's maternal grandfather's son's son's son's son's son's son
47. Father's paternal grandfather's son's daughter's daughter's son's son's son
48. Father's paternal grandfather's daughter's son's daughter's son's son's son
49. Father's paternal grandfather's daughter's daughter's son's son's son's son
50. Father's maternal grandfather's son's son's daughter's son's son's son
51. Father's maternal grandfather's son's daughter's son's son's son's son

52. Father's maternal grandfather's daughter's son's son's son's son's son
53. Father's paternal grandfather's daughter's daughter's daughter's son's son's son
54. Father's maternal grandfather's son's daughter's daughter's son's son's son
55. Father's maternal grandfather's daughter's son's daughter's son's son's son
56. Father's maternal grandfather's daughter's daughter's son's son's son's son
57. Father's maternal grandfather's daughter's daughter's daughter's son's son's son.

III. *Matri Bandhus*

1. Mother's paternal grandfather[363]
2. Mother's maternal grandfather
3. Mother's paternal grandfather's son
4. Mother's maternal grandfather's son
5. Mother's paternal grandfather's son's son
6. Mother's paternal grandfather's daughter's son[364]
7. Mother's maternal grandfather's son's son
8. Mother's maternal grandfather's daughter's son
9. Mother's paternal grandfather's son's son's son
10. Mother's paternal grandfather's son's daughter's son
11. Mother's paternal grandfather's daughter's son's son. He is preferred to no. 17[365]
12. Mother's maternal grandfather's son's son's son
13. Mother's paternal grandfather's daughter's daughter's son
14. Mother's maternal grandfather's son's daughter's son
15. Mother's maternal grandfather's daughter's son's son
16. Mother's maternal grandfather's daughter's daughter's son
17. Mother's paternal grandfather's son's son's son's son
18. Mother's paternal grandfather's son's son's daughter's son
19. Mother's paternal grandfather's son's daughter's son's son
20. Mother's paternal grandfather's daughter's son's son's son
21. Mother's maternal grandfather's son's son's son's son

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363 *Krishnayya v Pichamma*, (1888) 11 Mad 287.
364 *Adit Narayan v Mahabir Prasad*, (1921) 48 IA 86 : 60 IC 251 : AIR 1921 PC 53.
365 *Chengiah v Subbaraya*, (1930) 58 Mad LJ 562 : 128 IC 172 : AIR 1930 Mad 555.

22. Mother's paternal grandfather's son's daughter's daughter's son
23. Mother's paternal grandfather's daughter's son's daughter's son
24. Mother's paternal grandfather's daughter's daughter's son's son
25. Mother's maternal grandfather's son's son's daughter's son
26. Mother's maternal grandfather's son's daughter's son's son
27. Mother's maternal grandfather's daughter's son's son's son
28. Mother's paternal grandfather's daughter's daughter's daughter's son
29. Mother's maternal grandfather's son's daughter's daughter's son
30. Mother's maternal grandfather's daughter's son's daughter's son
31. Mother's maternal grandfather's daughter's daughter's son's son
32. Mother's maternal grandfather's daughter's daughter's daughter's son
33. Mother's paternal grandfather's son's son's son's son's son
34. Mother's paternal grandfather's son's son's daughter's son's son
35. Mother's paternal grandfather's son's daughter's son's son's son
36. Mother's paternal grandfather's daughter's son's son's son's son
37. Mother's maternal grandfather's son's son's son's son's son
38. Mother's paternal grandfather's son's daughter's daughter's son's son
39. Mother's paternal grandfather's daughter's son's daughter's son's son
40. Mother's paternal grandfather's daughter's daughter's son's son's son
41. Mother's maternal grandfather's son's son's daughter's son's son
42. Mother's maternal grandfather's son's daughter's son's son's son
43. Mother's maternal grandfather's daughter's son's son's son's son
44. Mother's paternal grandfather's daughter's daughter's daughter's son's son
45. Mother's maternal grandfather's son's daughter's daughter's son's son
46. Mother's maternal grandfather's daughter's son's daughter's son's son
47. Mother's maternal grandfather's daughter's daughter's son's son's son
48. Mother's maternal grandfather's daughter's daughter's daughter's son's son
49. Mother's paternal grandfather's son's son's son's son's son's son
50. Mother's paternal grandfather's son's son's daughter's son's son's son
51. Mother's paternal grandfather's son's daughter's son's son's son's son
52. Mother's paternal grandfather's daughter's son's son's son's son's son
53. Mother's maternal grandfather's son's son's son's son's son's son
54. Mother's paternal grandfather's son's daughter's daughter's son's son's son
55. Mother's paternal grandfather's daughter's son's daughter's son's son's son

56. Mother's paternal grandfather's daughter's daughter's son's son's son's son
57. Mother's maternal grandfather's son's son's daughter's son's son's son
58. Mother's maternal grandfather's son's daughter's son's son's son's son
59. Mother's maternal grandfather's daughter's son's son's son's son's son
60. Mother's paternal grandfather's daughter's daughter's daughter's son's son's son
61. Mother's maternal grandfather's son's daughter's daughter's son's son's son
62. Mother's maternal grandfather's daughter's son's daughter's son's son's son
63. Mother's maternal grandfather's daughter's daughter's son's son's son's son
64. Mother's maternal grandfather's daughter's daughter's daughter's son's son's son.

The above lists are prepared on the basis of the decision and dictum in *Kesar Singh*'s case.[366] But nos 14A and 42-56B of the *atma bandhus*, nos 28–57 of the *pitri bandhus*, nos 33–64 of the *matri bandhus* would be excluded by *Brij Mohan*'s case[367] and a few others by *Gajadhar Prasad*'s case.[368]

§ 55. *Bandhus* who are descendants of remoter ancestors.—The *bandhus*, whose order of succession is given in § 61, are all descendants of the great grandfathers, the grandfathers and father of the propositus. It may become necessary to consider the position in regard to the descendants of ancestors higher than the great grandfathers, *vide* Table titled "Order of Succession among Bhandus".

The first question that arises in respect of such *bandhus* is whether they fall under the heading '*Pitri bandhus*' and '*Matri bandhus*' or have to be classified into other classes. The importance of such a question may be illustrated thus: Suppose the two rival claimants are: (1) a descendant of mother's father's father and, therefore, admittedly a *matri bandhu*; and (2) a cognate descendant of father's father's father's father. If the latter must be regarded as a *pitri bandhu*, he will be preferred to the former according to the decision in *Muthusami v Muthukumarasami.*[369] However, it will be noticed that he is descended from an ancestor higher than the ancestor through whom the first claimant traces descent and he does not appear among the *pitri bandhus* mentioned in § 49. If he falls under a different class, which has to be given a different name such as *pitri-pitri bandhus*, he, being descended from a remoter ancestor and not being a *pitri bandhu*, must yield to his rival.

The question has never arisen before the courts and may never arise. An instance of such a person being regarded as a *bandhu*, but without any rival claimant is that of the father's father's father's son's son's daughter's son.[370] Several judges in India

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366 *Kesar Singh v Secretary of State for India*, (1926) 49 Mad 652 : 95 IC 651 : AIR 1926 Mad 881.
367 *Brij Mohan v Kishun Lal*, (1938) ALJ 670 : AIR 1938 All 443.
368 *Gajadhar Prasad v Gauri Shankar*, (1932) 54 All 698 : 138 IC 561 : AIR 1932 All 417.
369 *Muthusami v Simambedu*, (1896) 19 Mad 405 : 23 IA 83.
370 *Manick Chand v Jagat Settani*, (1890) 17 Cal 518.

have expressed the opinion that it is not possible to divide all *bandhus* into the three classes as mentioned in *Mitakshara* (§ 46). *Mitakshara* itself does not say that all *bandhus* fall into three classes. Like the individual *bandhus*, the classes mentioned in it may be regarded as illustrative and not as exhaustive. The opposite view is stated in the second proposition of the Madras High Court in *Muttusami v Muttukumarasami*[371] which runs thus: '(2) That, as stated in the text of *Vridha Satatapa* or *Baudhayana*, they are of three classes...'

It is true that the four propositions laid down in that case were generally approved in appeal in *Vedachela v Subramania*[372] by the Judicial Committee. However, in none of these cases, was it necessary to deal with the question and too much should not be attached to such general approval. It is submitted that *bandhus* descended from the higher ancestors should be classed into: (1) *pitri-pitri bandhus*; (2) *pitri-matri bandhus*; (3) *matri-pitri bandhus*; and (4) *matri-matri bandhus*; and similarly, for descendants of remoter ancestors.[373] It is on the assumption that all *bandhus* fall into three classes that some of the reasoning of the Allahabad High Court in *Gajadhar Prasad v Gauri Shankar*[374] is based.

§ 56. Female *bandhus* in Bombay and Madras.—The *bandhus* mentioned in § 54 above are all males. *Mitakshara* nowhere expressly mentions female *bandhus*. The nine instances there given are all instances of male *bandhus*. The Benares and Mithila schools follow the strict letter of *Mitakshara*, and do not recognise females as *bandhus*. In Bombay and Madras, however, certain females are recognised as *bandhus*.

Every female other than the daughter in Madras, and other than the daughter, sister and father's sister in Bombay, who rank above *bandhus*, and, if she were a male would have been an heir, that is, who is related to the propositus by birth, within the limits of degrees for *bandhus* is regarded as a heritable *bandhu*.

IN BOMBAY	IN MADRAS
Brother's daughter.[375]	
Sister's daughter.[376]	Brother's daughter.[379]
Paternal uncle's daughter.[377]	Brother's son's daughter.[380]
Paternal grandfather's sister's son's daughter.[378]	Father's brother's daughter.[381]

371 *Muttusami v Muttukumarasami*, (1893) 16 Mad 23, p 30.
372 *Vedachela v Subramania*, (1922) 48 IA 349, p 359 : 44 Mad 753 : 64 IC 402 : AIR 1922 PC 33.
373 *Umashankar v Mussamat Nageshwari*, (1918) 3 Pat LJ 663 : 48 IC 625 : AIR 1918 Pat 1; *Rami Reddi v Gangi Reddi*, (1925) 48 Mad 722 : 87 IC 609 : AIR 1925 Mad 807, pp 809, 810; *Kalimuthu v Ammamuthu*, (1935) 58 Mad 238 : 153 IC 107 : AIR 1934 Mad 611.
374 *Gajadhar Prasad v Gauri Shankar*, (1932) 54 All 698 : 138 IC 561 : AIR 1932 All 417.
375 *Bal Krishna v Ramkrishna*, (1921) 45 Bom 353 : 59 IC 771 : AIR 1921 Bom 189.
376 *Dattatraya v Gangabai*, (1922) 46 Bom 541.
377 *Kenchava v Girimallappa*, (1924) 51 IA 368 : 48 Bom 569 : 82 IC 966 : AIR 1924 PC 209 (postponed to father's sister's son).
378 *Bai Vijli v Bai Prabhalakshmi*, (1907) 9 Bom LR 1129.
379 *Venkatasubramaniam v Thayarammah*, (1898) 2 Mad 263.
380 *Jagannadhan v Adilakshmi*, (1940) ILR Mad 734 : AIR 1940 Mad 545.
381 *Fakula Majhi v Subhadra*, AIR 1969 Ori 3 (case of Madras law). In Madras, a father's brother's daughter succeeds as *bandhu* when the deceased has not left any other male heir; *Jagannadhan v Adilaxmi*, AIR 1940 Mad 545.

It has been held by a Full Bench of the Bombay High Court,[382] overruling earlier decisions of the same court, that it is not the correct rule, that according to *Mitakshara* law as applied in the Bombay state, a male *bandhu* is to be preferred to a female *bandhu*, even though the latter is nearer in degree. The first test to apply is to determine in which particular class a *bandhu* falls among the classes enumerated in *Mitakshara*, and preference should always be given to the class enumerated earlier over those mentioned subsequently. The next test to apply would be to find out as to which of the *bandhus* is nearer in degree in a particular class. If a female *bandhu* is nearer in relation, she should be preferred to a remote male *bandhu*. If the rival claimants are equally related, then only the principle of religious efficacy should be applied and in that case, a male can be preferred to a female.

In Madras and Andhra Pradesh,[383] a male *bandhu* is entitled to preference over a female *bandhu*, even though the female *bandhu* is nearer in degree.[384] Under the Hindu Law of Inheritance (Amendment) Act, 1929 (2 of 1929), the son's daughter, the daughter's daughter and the sister inherit with *gotraja sapindas*, the son's daughter succeeding immediately after the father's father, the daughter's daughter next after her, and the sister next after the daughter's daughter (see § 43, nos 13A, 13B and 13C). In Bombay, the sister has a higher place even before the Act and retains it. As to half-sister, see § 43,(13C) (ii).

The female relations mentioned above are regarded as *bandhus* on the ground that 'any relative who is also a cognate may be treated as coming within the definition of *bhinna gotra sapinda*, and that the term *sapinda*, as used in Chapter II, section vi of *Mitakshara*, includes females'.[385]

In Madras, such females come after all the male *bandhus*.[386] For the order in Bombay see § 74. Amongst themselves, they succeed in the order of propinquity.

§ 56A. Heirs of an illegitimate son.—When the illegitimate son of a woman dies leaving his mother but no nearer heirs, she is entitled to succeed as a heir in accordance with the general principles of Hindu law.[387] The illegitimate sons of a prostitute, though by different fathers, are entitled to succeed to each other. Similarly, the legitimate son of one of such sons is entitled to succeed to them, and also to their legitimate sons.[388] So if *A* and *B* are son and daughter of a woman living in adultery and *A* dies leaving *B* but no legitimate heirs, *B* is entitled to succeed to *A*.[389]

The decisions on the subject were reviewed in a case by the Madras High Court.[390] Also, see observations of Devadoss J in *Visvanatha v Doraiswami*.[391]

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382 *Kisan Dhondu v Shevantabai*, (1949) 52 Bom LR 327 : AIR 1950 Bom 254; overruling *Balkrishna v Ramkrishna*, (1920) 22 Bom LR 1442 and *Girimallappa v Kenchava*, (1920) 45 Bom 768.

383 *Gurukul v Sundaramma*, (1975) AP LJ 145.

384 *Kalimmal v Muthu Pillai*, AIR 1966 Mad 118.

385 *Balamma v Pullayya*, (1895) 18 Mad 168, p 170.

386 *Narasimma v Managammal*, (1890) 13 Mad 10; *Rajah Venkata v Rajah Surenani*, (1908) 31 Mad 321; *Lekshmana Iyer v Punnu Ammal*, AIR 1952 Tr & Coch 317.

387 *Jagarnath Gir v Sher Bahadur Singh*, (1935) 57 All 85 : 153 IC 1078 : AIR 1935 All 329. Certain observations in this case were commented on in *Sadu Ganaji v Shankerrao*, (1955) ILR Nag 467 : AIR 1955 Nag 84.

388 *Visvanatha v Doraiswami*, (1925) 48 Mad 944 : 91 IC 193 : AIR 1926 Mad 289.

389 *Dattatraya v Matha Bala*, (1934) 58 Bom 119 : 114 IC 821 : AIR 1934 Bom 36.

390 *State of Madras v Ramanatha Rao*, (1960) ILR Mad 800 : AIR 1960 Mad 436 (*Matri bandhus* entitled to succeed).

391 *Visvanatha v Doraiswami*, (1925) 48 Mad 944, p 946 : 91 IC 193 : AIR 1926 Mad 289.

The illegitimate son of a *Sudra* being an heir to his father, the father also is an heir to him, provided of course, the illegitimate son dies without leaving any issue, widow or mother.[392]

Note.—§§ 57 and 58 below are not affected by the Hindu Succession Act, 1956, because it cannot be said that provision is made in that Act for succession covered by §§ 57 and 58.[393]

§ 57. Preceptor, disciple and fellow-student.—(1) In default of kindred, the property of a deceased Hindu, who became an ascetic (hermit), even though he be a *Sudra*, passes to his preceptor; if there be no preceptor, to his disciple; and if there be no disciple to his fellow-student. In determining who is a preceptor, a disciple or fellow-student, the court will only consider the imparting of purely religious instruction.[394]

(2) Entrance of a Hindu into a religious order generally operates as a civil death.[395] The man who becomes an ascetic severs his connection with the members of his natural family and being adopted by his preceptor becomes, so to say, a spiritual son of the latter. The other disciples of his *guru* are regarded as his brothers, while the co-disciples of this *guru* are looked upon as uncles and this way, a spiritual family is established on the analogy of a natural family.[396]

In the Madras case referred to above, it was held that the disciple of an ascetic *Sudra*, who left no kindred, was entitled to succeed to his estate so as to prevent its *escheat* to government.[397]

Under the Bengal school of law, a *dikshaguru* who is not a person who gives *upanayan*, cannot be regarded as *acharya* or preceptor and is not entitled to succeed to the property of this disciple in default of kindred.[398]

In *Tiruvenkatacharier v Andalamma*, the Andhra Pradesh High Court had to consider whether the avocation of *Sishya Sancharam* was an office of property and whether it was heritable and partible. It had also to consider whether earnings from this avocation constitute joint family property.[399]

§ 58. Hermits and members of religious orders.—The heir to the property of a hermit (*vanaprastha*) is his spiritual brother belonging to the same hermitage, to that of an ascetic (*sanyasi*) a virtuous pupil, and to that of a student in theology (*bramhachari*) his religious preceptor. These heirs are entitled to succeed in preference to the kindred of the deceased. This rule applies only to the members of the twice-born classes. It does not apply to *Sudras*, unless some usage or custom to that effect is proved.[400] It has been

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392 *Subramania v Rathnavelu*, (1918) 41 Mad 44 : 42 IC 556 : AIR 1918 Mad 1346 (FB).

393 Hindu Succession Act, 1956, section 54.

394 *Sambasiva v Secretary of State for India*, (1921) 44 Mad 704 : 63 IC 659 : AIR 1921 Mad 537.

395 For essentials of initiation into *sanyasa ashram*, see § 111, and cases cited there.

396 See § 111. *Sital Das v Sant Ram*, AIR 1954 SC 606, p 613.

397 *Mitakshara*, Chapter II, section 7.

398 *Sadananda v Harinam*, AIR 1950 Cal 179.

399 *Tiruvenkatacharier v Andalamma*, AIR 1969 AP 303.

400 *Ramdas v Baldevdas*, (1915) 39 Bom 168 : 26 IC 607 : AIR 1914 Bom 116 (*sanyasi*); *Dharamapuram v Virapandiyam*, (1899) 22 Mad 302 (*Sudra*); *Collector of Decca v Jagat Chunder*, (1901) 28 Cal 608 (claim of preceptor's preceptor allowed as proved by custom); *Harish Chandra v Atir Mahmud*, (1913) 40 Cal 545 : 18 IC 474 (*Sudra*); *Somasundarum v Vaithilinga*, (1917) 40 Mad 846 : 41 IC 546 : AIR 1918 Mad 794 (*Sudra*); *Sobhddi v Gobind*, (1924) 46 All 616 : 80 IC 579 : AIR 1924 All 742. However, see *Krishna Singh v Mathura Ahir*, AIR 1972 All 273. See the decision of

(Footnote No. 400 Contd.)

held by the Supreme Court[401] that where usage is established, according to which a *Sudra* can enter into a religious order in the same way as in the case of the twice-born classes, such usage would be given effect to.

The heirs mentioned in § 57 are not entitled to succeed except in default of kindred.[402] The present section deals exclusively with succession to the property of members of religious orders who belong to the twice-born classes. *Sanyasis* are members of the twice-born classes.[403] The heirs enumerated in this section are entitled to succeed in priority to the kindred of the deceased.

§ 59. *Escheat.*—(1) On failure of all the heirs mentioned above, the government takes by *escheat*.[404] Where the government claims by *escheat*, the onus lies on the government to show that the last proprietor dies without heirs.[405] The onus lies heavily on a party who contends that there was absence of any heir of the deceased. Ordinarily, the court is slow in accepting the plea of *escheat* and will only do so after being satisfied that all the essential conditions for *escheat*, for instance, public notice by the government, are completely fulfilled.[406]

(2) An estate taken by *escheat* is subject to the trusts and charges, if any, previously affecting the estate,[407] e.g., maintenance of widows,[408] and mortgages created by a widow for legal necessity,[409] but not to unauthorised alienations by widow.[410]

For further reference, see section 29 of Hindu Succession Act, 1956.

Succession After Reunion

§ 60. Order of Succession among reunited members.—In Madras, it has been held that the share of a reunited member survives to the other members of the reunited family like the share of a member of a normal joint family.[411]

In Calcutta, the opinion has been expressed that the principle of survivorship applies to reunited coparceners.[412]

The Madras High Court has expressed the opinion that a reunited son has a preferential right of inheritance to one who remains separate.[413]

(Footnote No. 400 Contd.)
the Supreme Court in *Krishna Singh v Mathura Ahir* affirming the decision of the Allahabad High Court.

401 *Krishna Singh v Mathura Ahir*, AIR 1980 SC 707.

402 *Mitakshara,* Chapter II, section 8; see § 111.

403 *Ramdas v Baldevdas*, (1915) 39 Bom 168, p 174 : 26 IC 607 : AIR 1914 Bom 116; *Sital Das v Sant Ram*, AIR 1954 SC 606, p 613; *Gulabrao v Nagorao*, (1952) Nag 591 : AIR 1952 Nag 102 (requirements of a person taking *sanyas*).

404 *Collector of Masulipatam v Cavaly Vankata*, (1860) 8 MIA 500; *Ram Chandra v Man Singh*, AIR 1968 SC 954.

405 *Girdhari Lall v Bengal Government*, (1868) 12 MIA 448 : 10 WR 31 (PC); *Ganpat v Secretary of State*, (1921) 45 Bom 1106, p 1110 : 62 IC 109 : AIR 1921 Bom 138; *United Provinces through Deputy Commissioner, Hardoi v Kanhaiyalal*, (1941) 16 Luck 551 : 192 IC 131 : AIR 1941 Ori 337; *State of Madras v Ramanatha Rao*, AIR 1960 Mad 436.

406 *State of Bihar v Radha Krishna Singh*, AIR 1983 SC 684 : (1983) SCC 118.

407 *Collector of Masulipatam v Cavaly Vankata,* (1860) 8 MIA 500, p 527.

408 *Gulab Koonwar v Collector of Benares*, (1847) 4 MIA 246, p 258.

409 *Cavaly Vancata v Collector of Masulipatam*, (1867) 11 MIA 619.

410 *Collector of Masulipatam v Cavaly Vankata, supra.*

411 *Samudrala v Samudrala*, (1910) 33 Mad 165 : 3 IC 741.

412 *Jasoda v Sheo*, (1890) 17 Cal 33; *Sham v Court*, (1873) 20 WR 197.

413 *Nana v Ramchandra*, (1909) 32 Mad 377, pp 382, 383 : 2 IC 519.

The following is the order of succession according to *Viramitrodaya*:

1-3. Son, grandson, and great-grandson
4. Reunited whole brother
5. Reunited half-brother and separated full brother[414]
6. Reunited mother
7. Reunited father
8. Any other reunited copartner
9. Half-brother not reunited
10. Mother not reunited
11. Father not reunited
12. Widow
13. Daughter
14. Daughter's son
15. Sister.

Subject to the above, the succession goes to the *sapindas*, *samanodakas* and *bandhus* in the order and according to the rules set forth in §§ 43, 45 and 50.[415] As to reunion, see §§ 342–344.

The order of succession, according to the *Smriti Chandrika*, is as follows:

1. Son, grandson, great-grandson
2. Reunited full-brother
3. Separated full-brother
4. Reunited half-brother
5. Reunited father or paternal uncle
6. Separated half-brother
7. Father
8. Mother
9. Virtuous widow
10. Sister
11. *Sapindas*
12. *Samanodakas.*

According to *Mayukha*, the reunited member has in every case preference over the unreunited. However, when there are separated full-brothers and reunited half-brothers, uncles and the like, the separated full-brother, etc., takes equally with the reunited half-brother, etc. After the brother, the mother takes, then father, then the widow, then the sister, then the daughter, and after her the nearest *sapinda*.[416]

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414 *Ramasami v Vankatesam*, (1893) 16 Mad 440.
415 *Sarkar's Hindu Law*, 7th edition, p 587.
416 See *Ghose's Hindu Law*, 3rd edition, pp 625–26.

CHAPTER V

FEMALE HEIRS

SYNOPSIS

Law Prior to the Hindu Succession Act, 1956

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LAW PRIOR TO THE HINDU SUCCESSION ACT, 1956

Note.—Reference may be made to the note to Chapter III.

§ 61. Female heirs: Bengal School.—According to the Bengal School, the only females recognised as heirs, to a male, are: (1) the widow; (2) the daughter; (3) the mother; (4) the father's mother; and (5) the father's father's mother.[1]

§ 61A. Female heirs: *Mitakshara* School.—(1) Before the Hindu Law of Inheritance (Amendment) Act, 1929,* the only females recognised as heirs in the Benares[2] and *Mithila* Schools were: (i) the widow; (ii) the daughter; (iii) the mother; (iv) the father's mother; and (v) the father's father's mother.[3]

Accordingly, it had been held in Lahore that a sister's son's daughter is not an heir.[4]

The Madras School[5] held that the brother's daughter, sister's daughter, brother's son's daughter, father's sister are also heirs in the Madras State (§ 56). The Bombay School has gone much further, and it includes in the list of female heirs not only the heirs recognised in the Benares, Mithila and Madras schools, but also widows of *gotraja sapindas* (§ 68). The recognition of widows of *gotraja sapindas* as heirs in

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1 *Guru Gobind v Anand Lal*, (1870) 5 Beng LR 15, p 37 (FB).
* Now repealed by the Hindu Succession Act, 1956 (30 of 1956).
2 *Jagan Nath v Champa*, (1906) 28 All 307; *Srimati Krishna v Bhaiya-Rajendra*, (1927) 2 Luck 43 : 104 IC 155 : AIR 1927 Ori 240; *Jang Bir v Jamna*, (1931) 12 Lah 534 : 135 IC 593 : AIR 1932 Lah 37 (sister not an heir).
3 *Lallubhai v Cassibai*, (1880) 5 Bom 110, p 118 : 7 IA 212, p 231.
4 *Rameshwar v Ganpati Devi*, (1937) Lah 525 : 166 IC 753 : AIR 1936 Lah 652.
5 *Balamma v Pullayya*, (1895) 18 Mad 168, p 170.

Bombay has been accorded by the Privy Council on the ground of usage.[6] However, the widows of *bandhus* are not recognised as heirs anywhere; for instance, a sister's son's widow.[7]

(2) Under the Hindu Law of Inheritance (Amendment) Act, 1929,* which came into force on 21 February 1929, the son's daughter, the daughter's daughter, and the sister (§ 43, nos 13A to 13C) rank as heirs in all parts of India where *Mitakshara* law prevails. Before the Act, they ranked as heirs only in the Bombay (§ 56) and Madras (§ 56) states.

Before the Act, both the son's daughter and the daughter's daughter ranked as *bandhus* in Bombay and Madras. Under the Act, however, they both inherit as *gotraja sapindas* (§ 43, Nos 13A and 13B). As regards the sister, she succeeded in Bombay immediately after the paternal grandmother, and in Madras, she succeeded as a *bandhu*. As regards her place in the order of inheritance in Bombay, the Act effects no change and she will succeed immediately after the paternal grandmother as she did before the Act (§ 65). In Madras, however, she will, since the Act, succeed immediately after the daughter's daughter's daughter (§ 43, Nos 13A–13C).

§ 62. Female heirs in Benares and Mithila.—The only females recognised as heirs in the Benares and Mithila Schools before the Hindu Law of Inheritance (Amendment) Act of 1929* were: (1) the widow; (2) the daughter; (3) the mother; (4) the father's mother; and (5) the father's father's mother. No other female was recognised as an heir.[8] Under the Act, the son's daughter, the daughter's daughter, and the sister also rank as heirs (§ 43, Nos 13A, 13B and 13C).

§ 63. Female heirs in Madras.—The Madras School recognises not only the widow, daughter, mother, father's mother, and father's father's mother as heirs, but also the females mentioned in § 56. This includes the son's daughter, daughter's daughter and sister, who are expressly named as heirs in the Hindu Law of Inheritance (Amendment) Act, 2 of 1929* (see § 61A). The Madras School does not admit the widows of *gotraja sapindas* as heirs.[9]

§ 64. Female heirs in Bombay.—The Bombay School recognises not only the widow daughter, mother, father's mother, and father's father's mother as heirs, but also the following females:

(1) Sister, whether of the whole or half-blood. The sister is considered a *sapinda* by virtue of her affinity to her brother. She is also considered a *gotraja sapinda* as having been born in her brother's *gotra* or family.[10] The sister is expressly mentioned as an heir in the Hindu Law of Inheritance (Amendment) Act 2 of 1929* [§ 43 (13C)].

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6 *Lallubhoi v Cassibai*, (*supra*).

7 *Rameshwar v Ganpati Devi*, (1937) Lah 525 : 166 IC 753 : AIR 1936 Lah 652.

* Now repealed by the Hindu Succession Act, 1956 (30 of 1956).

8 *Tirath Ram v Kahan Devi*, (1920) 1 Lah 588, pp 593–94: 60 IC 101, AIR 1921 Lah 149; *Suja Devi v Jagiri Mal*, (1920) 1 Lah 608 : 59 IC 124 : AIR 1920 Lah 514.

9 *Balamma v Pullaya*, (1895) 18 Mad 168 (widow of great-grandson of great-grandfather of the deceased not an heir); *Kanakammal v Ananthamathi*, (1914) 37 Mad 293 : 25 IC 901 : AIR 1915 Mad 18 (brother's widow not an heir).

10 See § 66 *Kesserbai v Valab*, (1880) 4 Bom 188.

The *Mayukha* expressly names the sister as an heir. *Mitakshara* does not name the sister, but certain commentators of repute do so.[11]

The paternal uncle's daughter is not a *gotraja sapinda*,[12] but a *bandhu* (§ 56).

(2) Father's sister, whether of the whole or half-blood—see § 74.

(3) The widows of the predeceased *gotraja sapindas,* that is, of *sapindas* and *samanodakas*,[13] but not widows of *bandhus* or *bhinna gotraja sapindas*.[14] Thus, the son, the father, the brother, the brother's son, the paternal uncle, the paternal uncle's son, are all *gotraja sapindas* of the deceased. Therefore, according to the Bombay decision, the son's widow,[15] the step-mother (father's widow),[16] the brother's widow,[17] the brother's son's widow,[18] the paternal uncle's widow,[19] and the widow of the paternal uncle's son,[20] are all *sagotra sapindas* and inherit necessarily before the *bandhus*. The above list is not exhaustive, but merely illustrative (see § 68).

The widows of *gotraja sapindas* are recognised as heirs in the Bombay State only. They were not regarded as heirs elsewhere.[21]

The Hindu Women's Rights to Property Act, 1937 (XVIII of 1937) made the widow of a predeceased son and the widow's predeceased son's predeceased son, heirs throughout India, except under the *Dayabhaga* school.

A *gotraja sapinda* is one born in the *gotra* or family of the deceased. The expression *'sagotra sapinda'* means of the same *gotra* and includes females that enter the *gotra* of the deceased by marriage.

(4) Female *bandhus* mentioned in § 56 above—These include the son's daughter and daughter's daughter, both of whom are expressly mentioned in the Hindu Law of Inheritance (Amendment) Act, 1929 (2 of 1929). However, they inherit with *gotraja sapindas* (§ 43, Nos 13A and 13B).

§ 65. Sister's place as an heir in the Bombay State.—(1) A sister is an heir in the Bombay State [§ 64(1)], and she inherits immediately after the paternal grandmother both under the *Mayukha* and *Mitakshara* as interpreted in Bombay.[22] Her place in the order of succession is not affected by the Hindu Law of Inheritance (Amendment) Act, 1929 (2 of 1929) [§ 43(13C)], [also see § 72(12) and § 77 (12)].

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11 See above.

12 *Krishnabai v Keshav*, (1920) 22 Bom LR 1162 : 59 IC 511 : AIR 1920 Bom 237.

13 *Lallubhai v Cassibai*, (1980) 5 Bom 110 : 7 IA 212; *Lakshmibai v Jayram*, (1869) 6 Bom HC 152.

14 *Vallabhdas v Sakarbai*, (1901) 25 Bom 281.

15 *Roopchand v Poollchand*, (1824) 2 Bom 670.

16 *Kesserbai v Valab*, (1880) 4 Bom 188, p 208.

17 *Nahalchand v Hemchand*, (1885) 9 Bom 31.

18 *Madhavram v Dave*, (1897) 21 Bom 739.

19 *Rachava v Kalingapa*, (1892) 16 Bom 716; *Raghunath Shanka v Laxmibai*, (1935) 59 Bom 417 : 37 Bom LR 150 : 157 IC 658 : AIR 1935 Bom 298.

20 *Lallubhoi v Cassibai*, (1880) 5 Bom 110 : 7 IA 12.

21 *Ananda Bibee v Nownit Lal*, (1883) 9 Cal 315, pp 317–22; *Blamma v Pullayya*, (1895) 18 Mad 168; *Thayammal v Annamalai*, (1896) 19 Mad 35; *Kanakammal v Ananthamathi*, (1914) 37 Mad 293 : 25 IC 901 : AIR 1915 Mad 18; *Soshil Chand v Mangal Ram*, AIR 1954 Punj 26, (1954) Punj 49.

22 *West and Buhler's Digest*, Bombay, 4th edition, pp 109–10; *Venayeck v Luxumeebaee*, (1864) 9 MIA 516 in appeal from 1 Bom HC 117 (a *Mayukha* case); *Lallubhai v Mankuvarbai*, (1878) 2 Bom 388 421, pp 445–46; *Kesserbai v Valab*, (*supra*); *Vithaldas v Jeshubai*, (1880) 4 Bom 219, p 221; *Bhagwan v Warubai*, (1908) 32 Bom 300.

Both under the *Mayukha* and *Mitakshara* as interpreted in Bombay State, a sister does not take before a full-brother's son.[23] In cases governed by *Mayukha*, she takes even before a half-brother,[24] and the half-brother's son,[25] but not in cases governed by *Mitakshara*.[26]

The sister takes before a paternal uncle,[27] a paternal uncle's son,[28] a paternal uncle's son's son,[29] or a more remote paternal male relative.[30] She also takes before a son's widow,[31] a stepmother,[32] a brother's widow[33] or paternal uncle's widow,[34] all of whom are widows of *gotraja sapindas* (§ 68). She also succeeds in preference to a paternal step-grandmother.[35]

(2) Sisters take absolute estates in severalty, and not as joint tenants in Bombay.[36]

§ 66. Half-sister as an heir in the Bombay State.—A half-sister is an heir in the Bombay State and she inherits, in cases governed by *Mitakshara*, immediately after the full-sister[37] and in cases governed by *Mayukha* after the half-brother.[38] Her place in the order of succession is not affected by the Hindu Law of Inheritance (Amendment) Act, 1929 (2 of 1929) [§ 43(13C)].

A half-sister takes before a stepmother,[39] a paternal uncle,[40] or a paternal uncle's widow.[41]

§ 67. Father's sister as an heir in the Bombay State.—See § 74.

§ 68. Widows of *gotraja sapindas* as heirs in the Bombay State.—The succession of widows of *gotraja sapindas* [§ 64(3)] is governed by the under-mentioned rules:

(i) no widow of a *gotraja sapinda* can inherit until after 'the compact series of heirs' ending with the brother's sons,[42] nor until after the sister and half-sister;[43]

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23 *Mulji v Cursandas*, (1900) 24 Bom 563.
24 *Sakharam v Sitabai*, (1879) 3 Bom 353.
25 *Bhagwan v Warubai*, (1908) 32 Bom 300; *Hari Annaji v Vasudev*, (1914) 38 Bom 438 : 441, 23 IC 944 : AIR 1914 Bom 134.
26 See §§ 72 and 77. *West and Buhler Digest*, Bombay, 4th edition, pp 105–06; *Muyi v Corsandas*, (1900) 24 Bom 563, pp 573, 579; *Hari Annaji v Vasudev*, (1914) 38 Bom 438 : 23 IC 944 : AIR 1914 Bom 134.
27 *Trikam v Natha*, (1912) 36 Bom 120 : 12 IC 359 (half-sister in *Mayukha*).
28 *Venayeck v Luxumeebaee*, (1864) 9 MIA 520; in appeal from 1 Bom HC 117.
29 *Biru v Khandu*, (1880) 4 Bom 214.
30 *Dhondu v Gangabai*, (1879) 3 Bom 369.
31 *Vithaldas v Jeshubai*, (1880) 4 Bom 219, p 221.
32 *Lakshmi v Dada*, (1879) 4 Bom 210.
33 *Rudrapa v Irava*, AIR 1904 Bom 82.
34 *Kesserbai v Valab*, (1880) 4 Bom 188.
35 *Lingangowda v Tulsawa*, (1915) 17 Bom LR 315 : 28 IC 588 : AIR 1915 Bom 48.
36 *Rindabai v Anacharya*, (1891) 15 Bom 206.
37 *West and Buhler's Digest*, Bombay, 2nd edition, p 186; *Jana v Rakhma*, (1919) 43 Bom 461, 52 IC 8 : AIR 1919 Bom 12.
38 *Kesserbai v Valab*, (1880) 4 Bom 188, pp 207–09.
39 See above.
40 *Trikam v Natha*, (1912) 36 Bom 120, 12 IC 359.
41 *Kesserbai v Valab, supra*.
42 *Nahalchand v Hemchand*, (1885) 9 Bom 31, p 34 (note).
43 *Vithaldas v Jeshubai*, (1880) 4 Bom 219, 221. Note that the son's widow is the first in the series of widows of *gotraja sapindas*.

(ii) subject to the above rule and provided that there is no existing male *gotraja sapinda* within the six degrees of the line to which her husband belonged,[44] the widow of a *gotraja sapinda* stands in the same place as her husband, if living, would have occupied;

(iii) where the contest lies between the widow of a *gotraja sapinda*, representing a nearer line and a male *gotraja sapinda* representing a remoter line, the former inherits by preference over the latter;[45]

(iv) widows of *gotraja sapindas* may succeed to the estate of a male or to that of a female. In the former case, they take a widow's estate; in the latter, an absolute estate [§ 17(2)];

(v) a widow who has remarried is not entitled to inherit as a *gotraja sapinda* in the family of her first husband.[46] However, unchastity at the time when the succession opens is not a disqualification to inherit as a *gotraja sapinda*.[47]

The series of heirs beginning with the son and ending with the brother's son is called 'the compact series of heirs'. No widow of a *gotraja sapinda* can inherit before any of these heirs.[48] Nor can she inherit before the sister or half-sister.[49]

A son is in the nearest male *gotraja sapinda* of the deceased owner; therefore, the first in the series of widows of *gotraja sapindas* is the son's widow.[50] Then comes the grandson's widow, and then the great-grandson's widow.

The next male after the great-grandson is the daughter's son. However, he is not a *gotraja sapinda*, for he belongs to a different *gotra* or family. The next male is the father. The male *gotraja sapindas* of the deceased in his father's line are his: (1) brother; (2) brother's sons; (3) brother's son's son; (4) brother's son's son's son; (5) brother's son's son's son's son; and (6) brother's son's son's son's son's son. The father's line begins with the father and ends with the brother's son's son's son's son. The father being with the first in his line, the step-mother (father's widow) is the first in the series of widow of *gotraja sapindas* in the father's line, and she takes before the brother's widow who is the second in the said series. However, she is not entitled to inherit, if there exists any lineal descendant of the father as far as the sixth degree, that is, if there be a brother, a brother's son, a brother's son's son, a brother's son's son's son, a brother's son's son's son's son or a brother son's son's son's son's son (see clause (ii) of this section).

Suppose now that the contest is between a brother's widow and a paternal uncle. The husband of the brother's widow, that is, the brother, belongs to the father's line and the paternal uncle belongs to the father's father's line, that is, a remoter line.

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44 *Lallubhoi v Cassibai*, (1880) 5 Bom 110 : 7 IA 212, in appeal from 2 Bom 388; *Rachava v Kalingapa*, (1892) 16 Bom 716, p 720; *Kashibai v Moreshwar*, (1911) 35 Bom 389 : 11 IC 560; *Basangavda v Basangavda*, (1915) 39 Bom 87 : 127 IC 167 : AIR 1914 Bom 202; *Ambaidas v Jijibhai*, (1912) 14 Bom LR 261 : 14 IC 979 (a *Mayukha* case).

45 *Rachava v Kalingapa*, (1892) 16 Bom 716, 718, (1915) 39 Bom 87, 27 IC 167, AIR 1914 Bom 202.

46 *Pranjivan v Bai Bhikhi*, (1921) 45 Bom 1247 : 63 IC 947 : AIR 1921 Bom 57.

47 *Akoba Lasman v Sai Genu*, (1941) Bom 438 : 197 IC 157 : AIR 1941 Bom 204 .

48 *Nahalchand v Hemchand*, (1885) 9 Bom 31, p 34 (note).

49 *Vithaldas v Jeshubai*, (*1880*) 4 Bom 219, 221.

50 See above.

The brother's widow is therefore entitled to succeed before the paternal uncle [see clause (iii) of this section. Also, see the under mentioned case].[51]

§ 69. Widows of *samanodakas* as heirs in the Bombay State.—The widows of predeceased *samanodakas* (§ 40) are held to be heirs in the Bombay State.[52]

§ 70. Daughters of descendants, ascendants and collaterals as heirs in the Bombay State.—The female descendants of the propositus and of his ancestors are *bandhus* in the Bombay State (§ 56).

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51 *Lallubhoi v Cassibai*, (1880) 7 IA 212, p 237 : 5 Bom 110, p 124.
52 *Lakshmibai v Jayram*, (1869) 6 Bom HCAC 152.

CHAPTER VI

ORDER OF SUCCESSION TO MALES IN THE BOMBAY STATE

SYNOPSIS

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LAW PRIOR TO THE HINDU SUCCESSION ACT, 1956

Note.—Reference may be made to the Note to Chapter III.

§ 71. Succession in the Bombay State.—(1) The order of succession to males in the Bombay State is different from that in other parts of India where *Mitakshara* law prevails. The difference arises from the fact that the Bombay School recognises as heirs, certain females who are not recognised as heirs in other parts of India (§§ 64–70).

(2) In the Bombay state itself, there is a difference between the order of succession in cases governed by *Mayukha* [§ 12(2)].

§ 72. Order of succession in cases governed by *Mitakshara*.—The following is the order of succession to males among *sapindas* in the Bombay State in cases governed by *Mitakshara*:

(1–6) Son, son's son (whose father is dead) and son's son's son (whose father and grandfather are both dead). These inherit simultaneously. Under Act XVIII of 1937, the widow, the predeceased son's widow, and the widow of a predeceased son of a predeceased son, are also recognised as heirs (see § 43).

See notes to § 43 nos 1–4.

(7) Daughter

See § 43, no 5, notes (i), (iv)–(vii).

In the Bombay State, daughters do not take as joint tenants with benefits of survivorship, but they take as tenants-in-common. Further, a daughter in that State does not take a limited estate in her father's property, but takes the property absolutely. Thus, if a Hindu governed by the Bombay School dies leaving two daughters, each daughter takes an absolute interest in a moiety of her father's estate, and holds it as

her separate property, and on her death her share will pass to her own heirs as her *stridhana* (§ 170).[1]

(8) Daughter's son

See notes to § 43, no 6.

(9) Mother

See notes to § 43, no 7. As to a stepmother see no 27.

(10) Father

(11) Brother:

(i) of the whole blood;

(ii) of the half-blood.

A brother of the full blood succeeds before a brother of the half-blood (see notes to § 43, no 9; see also § 44).

(12) Brother's son:[2]

(i) of the whole blood;

(ii) of the half-blood.

Sons of brothers of the whole blood succeed before sons of brothers of the half-blood (see notes to § 43, no 10; see also § 44).

(13) Grandmother (father's mother)

See note to no 14.

(14) Full sister

Her place in the order of succession is not affected by the Hindu Law of Inheritance (Amendment) Act, 1929 (2 of 1929) [§ 43(13C)], see §§ 64(1) and § 65.

(15) Half-sister

See § 43, no 13C and §§ 64(1) and 66.

The Three Remote Descendants of the Deceased

(16) Great-great-grandson

It is not settled whether nos 16, 17 and 18 succeed before or after no 19. In *Appaji v Mohan Lal*,[3] the question was raised, but not decided.

(17) Great-great-great-grandson

(18) Great-great-great-great-grandson

Widows of Four Male Lineal Descendants of the Deceased

(19) Great-grandson's widow

(20) Great-great-grandson's widow

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1 *Bhagirthibai v Kahnujirav*, (1887) 11 Bom 285; *Gulappa v Tayawa*, (1907) 31 Bom 453; *Vithappa v Savitri*, (1910) 34 Bom 510 : 7 IC 445.

2 *Nahalchand v Henchand*, (1885) 9 Bom 31 (takes before brother's son's widow).

3 *Appaji v Mohan Lal*, (1930) 54 Bom 564, p 611, 127 IC 385 : AIR 1930 Bom 273 (FB).

(21) Great-great-great-grandson's widow

(22) Great-great-great-great-grandson's widow

The Four Remote Descendants of the Brother

(23) Brother's son's son

He does not succeed before but succeeds after the son's widow (6) (no 17).

(24) Brother's son's son's son

(25) Brother's son's son's son's son

(26) Brother's son's son's son's son

Widows of Father, Brother and Brother's Descendants

(27) Step-mother[4]

(28) Brother's widow[5]

(29) Brother's son's widow[6]

(30) Brother's son's son's widow

(31) Brother's son's son's son's widow

(32) Brother's son's son's son's son's widow

(33) Brother's son's son's son's son's son's widow

Father's Father and his Six Descendants

(34) Father's father

(34A) Son's daughter

(34B) Daughter's daughter

(34C) Sister's son

For 34, 34A, 34B and 34C, see § 43, nos 13A, 13B and 13D.

(35) Paternal uncle:

(i) of the whole blood;

(ii) of the half-blood.

(36) Paternal uncle's son

He takes before no 42.[7]

(37) Paternal uncle's sons's son.

He takes before no 42.[8]

(38) Paternal uncle's son's son's son

(39) Paternal uncle's son's son's son's son

(40) Paternal uncle's son's son's son's son's son

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4 *Rakhmabia v Tukaram*, (1887) 11 Bom 47 (takes before half brother's widow); *Rusoabai v Zoolekhabai*, (1895) 19 Bom 707 (takes before the paternal uncle's son).

5 *Basangavda v Basangavda*, (1915) 39 Bom 87, 27 IC 167, AIR 1914 Bom 202 (takes before the paternal uncle's sons).

6 *Madhavram v Dave*, (1897) 21 Bom 739.

7 *Rachava v Kalingapa*, (1892) 16 Bom 716.

8 *Kashibai v Moreshwar*, (1911) 35 Bom 389.

Widows of Father's Father and his Six Descendants

(41) Father's stepmother

(42) Paternal uncle's widow

She takes before father's sister.[9]

(43) Paternal uncle's son's widow

(44) Paternal uncle's son's son's widow

(45) Paternal uncle's son's son's son's widow

(46) Paternal uncle's son's son's son's son's widow

(47) Paternal uncle's son's son's son's son's son's widow

The Third Agnate Female and the Third Agnate Male Ancestor and the Latter's Six Descendants

(48) Father's father's mother

(49) Father's father's father

(50) Father's paternal uncle

(51) Father's paternal uncle's son

(52) Father's paternal uncle's son's son

(53) Father's paternal uncle's son's son's son

(54) Father's paternal uncle's son's son's son's son

(55) Father's paternal uncle's son's son's son's son's son

Widows of Father's Father's Father and his Six Descendants

(56) Father's father's step-mother

(57) Father's paternal uncle's widow

(58) Father's paternal uncle's son's widow

(59) Father's paternal uncle's son's son's widow

(60) Father's paternal uncle's son's son's son's widow

(61) Father's paternal uncle's son's son's son's son's widow

(62) Father's paternal uncle's son's son's son's son's son's widow

The Remaining Sapindas and Their Widows

(63–70) The fourth agnate female and the fourth agnate male ancestor and the latter's six descendants, one after another.[10]

(71–77) Widows of *gotraja sapindas* nos 64 to 70, one after another.

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9 *Raghunath Shankar v Laxmibai*, (1935) 59 Bom 417 : 157 IC 658 : 37 Bom LR 150 : AIR 1935 Bom 298.

10 *Ambaidas v Jijibhai*, (1912) 14 Bom LR 261 : 14 IC 971.

§ 73. Order of succession among *samanodakas*.—Failing *sapindas* and their widows (§ 72), the inheritance goes to *samanodakas* according to the rules stated in § 45 above.

§ 74. Order of succession among *bandhus*.—Failing *samanodakas* the inheritance passes to *bandhus* according to the rules laid down in §§ 46 to 54 and 56 above. As regards the succession of *bandhus*, there is no difference between *Mitakshara* and *Mayukha*.[11]

Father's Sister.—According to § 56, the father's sister should be a *bandhu*, but according to *Mayukha*, she is a *gotraja sapinda*; she comes in before *bandhus* but after all the *gotraja sapindas*,[12] for instance, a father's paternal uncle's son,[13] or the paternal uncle's widow.[14] It is not clear whether, under *Mitakshara*, as interpreted in Bombay, she is a *gotraja sapinda* or a *bandhu*. However, she is not more remote than a *bandhu*.[15]

In *Saguna v Sadashiv*,[16] it was held that the father's half-sister, though a female, being a *bandhu ex parte paterna* is entitled to preference over the mother's brother, who though a male, is a *bandhu ex parte materna*.

This leads us to the question as to what are the principles to be applied in a contest between a male *bandhu* and a female *bandhu*. In *Balkrishna v Ramkrishna*,[17] it was held that a mother's sister's son should be preferred to a brother's daughter. This decision is in direct conflict with the previous decision, which was not cited either in the arguments or in the judgment. In *Kenchava v Girimallappa*,[18] the Privy Council left the question open and held that the father's sister's son (a male *bandhu ex parte paterna*) is to be preferred to the father's brother's daughter (a female *bandhu* of the same degree).

In *Bai Vijli*'s case,[19] a mother's sister's son, who is an *atma bandhu*, was preferred to a father's father's sister's son's daughter who is a *pitri bandhu*.

§ 75. Strangers as heirs.—See §§ 57 and 58.

§ 76. Escheat.—See § 59.

§ 77. Order of succession in cases governed by *Mayukha*.—The following is the order of succession to males in cases governed by *Mayukha*:[20]

(1–6) Same as § 72.

(7) Father.

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11 *Parot Bapalal v Mehta Harilal*, (1895) 19 Bom 631.
12 *Vijiarangam v Lakshuman*, (1871) 8 Bom HCOC 244, pp 261, 263.
13 *Ganesh v Waghu*, (1903) 27 Bom 610.
14 *Raghunath Shankar v Laxmi Bai*, (1935) 59 Bom 417 : 37 Bom LR 150 : 157 IC 658 : AIR 1935 Bom 298.
15 *Saguna v Sadashiv*, (1902) 26 Bom 710.
16 *Ibid.*
17 *Balkrishna v Ramkrishna*, (1920) 45 Bom 353, 59 IC 771, AIR 1921 Bom 189.
18 *Kenchava v Girimallappa*, (1924) 51 IA 368, pp 376–77, 48 Bom 569, 82 IC 966, AIR 1924 PC 209.
19 *Bai Vijli v Bai Probhalakshmi*, (1907) 9 Bom LR 1129.
20 *Mayukha*, Chapter IV, section 8.

(8) Mother.

See notes to § 72, no 7 and notes to § 43, no 7.

(9) Full brothers along with sons of full brothers who are dead.

This rule does not go beyond brothers and brother's sons.[21] Hence, an uncle's son's son's son does not take equally with, but is postponed to, an uncle's son's son.[22] As to the place of the half-brother, see no 13.[23]

(10) Full brother's son.

With the brother's son ends 'the compact series of heirs'. In default of brother's sons, the inheritance passes to *gotraja sapindas*, the first amongst them being the paternal grandmother (no 11).[24]

(11–12) Same as § 72.

(13) Father's father and half-brother, in equal shares.[25]

This is obsolete.[26] It is highly probable that the High Court of Bombay will in cases governed by *Mayukha* adopt the same order of succession as that in cases governed by *Mitakshara*, at least after no 12. The order of succession after no 12 will probably be: (1) half-brother; (2) half-sister; and the (3) half-brother's son. The order of succession will thenceforth be the same as that in cases governed by *Mitakshara* as interpreted in Bombay, that is, as in §§ 72–76. As to the father's sister, see § 74.

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21 *Chandrika Baksh v Muna Kunwar*, (1902) 29 IA 70, p 74 : 24 All 273, p 280. Reference may also be made to *Bai Nani v Manilal*, (1978) 19 Guj LR 4 (case law discussed).

22 *Haribhai v Mathur*, (1923) 47 Bom 940 : 77 IC 224 : AIR 1924 Bom 140.

23 *Mayukha*, Chapter IV, section 8, Volume 20.

24 *Mayukha*, Chapter IV, section 8, Volume 8.

25 *Vithalrao v Ramrao*, (1900) 24 Bom 317, p 338.

26 *Sakharam v Sitabai*, (1879) 3 Bom 353; *Kesserbai v Valab*, (1880) 4 Bom 188, pp 207–08.

CHAPTER VIII

POINTS OF DIFFERENCE BETWEEN *MITAKSHARA* AND *DAYABHAGA* SUCCESSION

LAW PRIOR TO THE HINDU SUCCESSION ACT, 1956

Note.—Reference may be made to the Note to Chapter III.

§ 95. Points of distinction between the *Mitakshara* and the *Dayabhaga* systems of inheritance.—The following are the main points of distinction between the *Mitakshara* and *Dayabhaga* systems of inheritance:

(1) The Bengal School divides heirs into three classes, namely: (1) *sapindas*; (2) *sakulyas*; and (3) *samanodakas*. The *sapindas* of the Bengal School are the *sapindas* of the *Mitakshara* School within four degrees only, plus *bandhus* of the *Mitakshara* School, but not all the *bandhus*. The *sakulyas* of the Bengal School are the *sapindas* of *Mitakshara* School from the fifth to the seventh degree. The *samanodakas* of the Bengal School are the same as those of *Mitakshara* School, that is, agnatic relations from the eighth to the fourteenth degree;

(2) Generally speaking, under *Dayabhaga* law, no *bandhu* or cognate can inherit while there is any *gotraja sapinda* or *samanodaka* in existence. Under *Dayabhaga* law, cognates come in with the agnates, and they inherit before *sakulyas* and *samanodakas*;

(3) Cognatic heirs under *Mitakshara* law are limited in number, compared to those under *Dayabhaga* law. Every person, who is a cognatic heir under *Dayabhaga* law, is also a cognatic heir under *Mitakshara* law, but there are some relatives who are cognatic heirs under *Mitakshara* law, but are not recognised as such under *Dayabhaga* law. The doctrine of spiritual efficacy, which is the governing principle of succession under *Dayabhaga* law, accounts for the exclusion of the latter;

(4) '*Sapinda*', according to *Mitakshara*, means a person connected through the same *pinda* or body; according to *Dayabhaga*, it means a person connected through the same *pinda* or funeral cake presented to the manes of ancestors at the *parvana sradha* ceremony (see § 80).

CHAPTER IX

EXCLUSION FROM INHERITANCE AND PARTITION

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LAW PRIOR TO THE HINDU SUCCESSION ACT, 1956

Note.—Reference may be made to the Note to Chapter III.

§ 96. Unchastity.—A widow who is unchaste at the time of her husband's death is not entitled to inherit his estate, but once the husband's estate has vested in her, which could only be if she was chaste at the time of her husband's death, it cannot be divested by her subsequent unchastity.[1]

Where the widow of a joint owner is given a widow's estate on her husband's death, under a family arrangement, such an estate is not divested by her subsequent unchastity, in the absence of any provision to that effect.[2] Reference may also be made to the Hindu Women's Rights to Property Act, 1937 (XVIII of 1937)* and the note to Chapter III.

There is a difference of opinion between the *Mitakshara* and *Dayabhaga* schools as to whether the unchastity of any other female heir excludes her from inheritance.

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1 *Moniram v. Keri Kolitani*, (1880) 5 Cal 776 : 7 IA 115; *Sellam v Chinnammal*, (1901) 24 Mad 441; *Gangadhar v Yellu*, (1912) 36 Bom 138 : 12 IC 714; *Jadho Nagu Bai v Jadho Gangu Bai*, AIR 1958 AP 19.

2 *Lakhmi Chand v Anandi*, (1935) 62 IC 250 : 57 All 672 : 37 Bom LR 849 : 157 IC 869 : AIR 1935 PC 180.

* Repealed by Act 30 of 1956.

According to *Mitakshara* law, the only female liable to exclusion from inheritance by reasons of unchastity is the widow.[3]

According to *Dayabhaga* law, the condition of chastity applies not only to the widow, but also to other female heirs, such as daughter and mother, to the same extent as it does to a widow (§ 88).[4]

Unchastity excludes a female from inheriting to a male, but not to a female. It is, therefore, not a bar to inheriting *stridhana*, even according to *Dayabhaga* law.[5]

§ 97. Change of religion and loss of caste.—Change of religion and loss of caste, which at one time were grounds of forfeiture of property and of exclusion from inheritance, ceased to be so after the passing of the Caste Disabilities Removal Act, 1850 (21 of 1850).[6]

The Act applies only to protect the actual person who either renounces his religion, or has been excluded from the communion of any religion or has been deprived of caste. Consequently, where the property of a Mohammedan, converted from Hinduism, has passed according to Mohammedan law to his descendants, Hindu collaterals cannot claim by virtue of the Act to succeed under Hindu law.[7]

Once a person has changed his religion and his personal law, that law will govern the rights of succession to his children.[8]

Illustrations

(a) *A* and his son *B* are members of a joint Hindu family. *A* becomes a convert to Mohammedanism. *A*, does not by his conversion, forfeit his interest in the joint family property. The only effect of the conversion is that it operates as a separation of the family, and one-half of the property vests immediately in *A*, and the other half in *B*.[9]

(b) A married Hindu becomes a convert to Mohammedanism, and marries a Mahommedan wife and has children by her. The persons entitled to his estate on his death are his Mohammedan wife and children, and not his Hindu wife.[10]

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3 See § 43, 'widow' and note (ii). *Advapa v Rudrava*, (1880) 4 Bom 104; *Tara v Krishna*, (1907) 31 Bom 495, 510; *Kojiyadu v Lakshmi*, (1882) 5 Mad 149; *Vedammal v Vedanayaga*, (1908) 31 Bom 100; *Dal Singh v Dini*, (1910) 32 All 155 : 5 IC 520; *Baldeo v Mathura*, (1911) 33 All 702 : 11 IC 43 (mother); *Ram Pergash v Mussammat Dahan Bibi*, (1924) 3 Pat 152 : 78 IC 749 : AIR 1924 Pat 420 (daughter).

4 *Ramananda v Rajkishori*, (1895) 22 Cal 347 (daughter); *Sundari v Litambari*, (1905) 32 Cal 871 (daughter); *Ramnath v Durga*, (1879) 4 Cal 550 (mother). In *Charu Priya v Roma Kanta*, AIR 1964 Assam 106, the Assam High Court has held that even according to *Dayabhaga* school, the condition of chastity applies only to the widow and not to any other female. This view is contrary to the view taken by the Calcutta High Court in the above-mentioned cases.

5 *Nogendra v Benoy*, (1903) 30 Cal 521; *Angammal v Venkata*, (1903) 26 Mad 509.

6 *Khunni Lal v Gobind*, (1911) 33 All 356 : 38 IA 87 : 10 IC 477 reversing SC in 29 All 487, (1924) 3 Pat 152 : 78 IC 749. See also *Subbaraya v Ramasami*, (1900) 23 Mad 171.

7 *Mitar Sen Singh v Magbul Hasan Khan*, (1930) 57 IA 313 : 52 CLJ 551 : 128 IC 268 : AIR 1930 PC 251, affirming (1928) 3 Luck 154 : 107 IC 890 : AIR 1928 Ori 138 and disapproving *Bhagwant Singh v Kallu*, (1889) 11 All 100; *Vaithilinga v Avyathorai*, (1927) 40 Mad 118 : 37 IC 753 : AIR 1918 Mad 430 (conversion to Christianity); *Chidambaram v Ma Nyein Me*, (1928) 6 Rang 243 : 111 IC 2 : AIR 1928 Rang 179; *Rupa v Sardar Mirza*, (1920) 1 Lah 376 : 55 IC 410 : AIR 1920 Lah 276 is no longer good law.

8 *Mitar Sen Singh v Magbul Hasan Khan*, (1930) 57 IA 313 : 52 CLJ 551 : 128 IC 26 : AIR 1930 PC 251.

9 *Khunni Lal v Gobind*, (1911) 33 All 356 : 38 IA 87 : 10 IC 477; *Gobind v Abdul*, (1903) 25 All 546, p 573.

10 *Chedambaram v Ma Nyein Me*, (1928) 6 Rang 243 : 111 IC 2 : AIR 1928 Rang 179.

(c) *A* and *B* are two Hindu brothers, separate in estate. *B* becomes a convert to Mohammedanism. After *B*'s conversion, a son *C* is born to him, who also is a Mohammedan. *B* dies leaving *C*. Afterwards, *A* dies leaving a widow. On *A*'s death, his widow succeeds to his property. After the widow's death, *C* claims *A*'s property as his nephew. *C* is not entitled to succeed to the property.

It may here be noted that the provisions of the Bengal Regulations VII of 1832 were to the same effect as those of Act XXI of 1850.

§ 98. Physical and mental defects: Disqualified heirs.—(1) Under the texts as interpreted by the courts, the following defects, deformities and diseases exclude a heir from inheritance:

(a) Blindness,[11] deafness, and dumbness,[12] provided the defect is both congenital and incurable;

(b) Want of any limb or organ, if congenital. This includes the case of a person who is lame,[13] or has no nose or tongue. It also includes the case of congenital impotence;

(c) Lunacy. This need not be congenital or incurable to exclude the heir from inheritance. It is enough if it exists at the time when the succession opens;[14]

(d) Idiocy, provided it is complete and absolute.[15] Idiocy is, of course, congenital;

(e) Leprosy, when it is of such a virulent type that it is incurable and renders him unfit for social intercourse. It need not be congenital;[16]

(f) Other incurable diseases.[17]

(2) Under the Hindu Inheritance (Removal of Disabilities) Act, 1928(XII of 1928), no person, other than a person who is, and has been from birth, a lunatic or an idiot is excluded from inheritance or from any right or share in joint family property by

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11 *Mohesh Chunder v Chunder Mohun,* (1875) 14 Bengal LR 273 (*Dayabhaga* case); *Murarji v Parvatibai,* (1876) 1 Bom 177; *Umabai v Bhavu,* (1876) 1 Bom 557; *Guneshwar v Durga Prasad,* (1917) 44 IA 229 : 45 Cal 17 : 42 IC 849 : AIR 1917 PC 146; *Pudiava v Pavanasa,* (1922) 45 Mad 949 : 69 IC 313 : AIR 1923 Mad 215 (FB); *Fakimath v Krushnachandra Nath,* AIR 1954 Ori 176.

12 *Vallabhram v Bai Hariganga,* (1867) 4 Bom HCAC 135; *Savitribai v Bhaubat,* (1927) 51 Bom 50 : 100 IC 586 : AIR 1927 Bom 103; *Bharmappa v Ujjangavda,* (1922) 46 Bom 455 : 65 IC 216 : AIR 1922 Bom 173; *Anukul Chandra v Surendra,* (1939) 1 Cal 592.

13 *Venkata v Purushottam,* (1903) 26 Mad 133.

14 *Muthammal v Subramaniaswami Devasthanam,* (1960) 2 SCR 729; *Baboo Bodhanarain v Omrao,* (1870) 13 MIA 520; *Koer Goolab Singh v Kurun Singh,* (1871) 14 MIA 176; *Deo Kishen v Budh Prakash,* (1883) 5 All 509 (FB); *Wooma Pershad v Grish Chunder,* (1884) 10 Cal 639; *Ram Singh v Bhani,* (1916) 38 All 117 : 32 IC 127 : AIR 1916 All 47; *Muthusami v Meenammal,* (1920) 43 Mad 464 : 55 IC 576 : AIR 1920 Mad 652; *Bapuji v Dattu,* (1923) 47 Bom 707 : 73 IC 279 : AIR 1923 Bom 425.

15 *Tirumamagal v Ramaswami,* (1863) 1 Mad 214; *Surti v Narain Das,* (1890) 12 All 530; *Ran Bijai v Jagatpal,* (1891) 18 Cal 111 (PC).

16 *Ramabai v Harnabai,* (1924) 51 IA 177 : 48 Bom 363 : 80 IC 193 : AIR 1924 PC 125; *Ananta v Ramabai,* (1876) 1 Bom 554; *Ranagayya v Thanikachalla,* (1896) 19 Mad 74; *Koyaorhana v Subbaraya,* (1915) 38 Mad 250 : 19 IC 690 : AIR 1916 Mad 470; *Karali v Ashutosh,* (1923) 50 Cal 604 : 75 IC 474 : AIR 1923 Cal 331. See also *Man Singh v Gaini,* (1918) 40 All 77 : 43 IC 62 : AIR 1918 All 377.

17 *Kayarohana Pathan v Subbaxaya Jhevan,* (1915) 38 Mad 250 : 19 IC 690 : AIR 1916 Mad 470.

reason only of any disease, deformity, or physical or mental defect. The Act came into force on 20 September 1928. It is not retrospective.

The Act does not apply to any person governed by *Dayabhaga* School of Hindu law (the Act is set out in Appendix II). Under the Act, the only defects which disqualify an heir from inheritance or from a share on partition are congenital lunacy and congenital idiocy.

A person not having a normal intellect cannot be said to be a congenital idiot, and is not disqualified from inheritance.[18]

§ 99. Murder.—A murderer, even if not disqualified under Hindu law from succeeding to the estate of the person murdered, is so disqualified upon the principles of justice, equity and good conscience. Further, no title to the estate of the person murdered can be claimed through the murderer. He should be treated as non-existent when the succession opens on the death of his victim; he cannot be regarded as a fresh stock of descent.[19]

P dies leaving his mother *C*, a son *H* and a daughter *K*, his father's brother, and his father's sister's son *G*. On *P*'s death, his mother *C* succeeds to his property for the ordinary Hindu widow's estate. *H* is the next reversioner. *H* murders *C* and is sentenced to transportation for life. Who is entitled to succeed to the estate of *P*? Not *H*, because he is the murderer. Is *H*'s sister *K* entitled to succeed? No, because she could only claim through *H*, the murderer. *H* should be regarded as non-existent at the date of *C*''s death, so that the next heir to *P*'s estate is his father's sister's son *G*. *G* is therefore entitled to succeed to *P*'s estate.[20]

The test of disqualification is whether the title is traced through the murderer.[21] The result is that not only is the murderer excluded from inheritance, but also his son, his sister,[22] or any other person claiming heirship through him. In Bombay, the wife of a murderer is not disentitled from succeeding to the estate of the murdered man. The reason is that she does not derive title through her husband, but succeeds in her own right as *gotraja sapinda*.[23] The Bombay High Court has also held that there could be no exclusion from inheritance or right to partition, if there is no question of the murderer of his son taking advantage of the murder.[24]

§ 100. Disability as excluding females.—The disabilities, which exclude a male from inheritance also, exclude a female from inheritance.[25]

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18 *Garja Singh v Gyanwati Devi*, AIR 2001 Mad 184.

19 *Kenchava v Girimallappa*, (1924) 51 IA 368 : 48 Bom 569 : 82 IC 966 : AIR 1924 PC 209, affirming 45 Bom 768, 61 IC 294 : AIR 1921 Bom 270 (paternal aunt); *Vedanayga v Vedammal*, (1904) 27 Mad 591 (mother); *Vedammal v Vedanayaga*, (1908) 31 Mad 100 (mother); *Shah Khanam v Kalandhar Khan*, (1900) Punj Rec No 74 (half mother); *Mst Jind Kuar v Indar Singh*, (1922) 3 Lah 103 : 67 IC 526 : AIR 1922 Lah 293; *Mata Badal v Bijay Bahadur*, AIR 1956 All 707.

20 *Kenchava v Girimallappa*, (1924) 51 IA 368 : 48 Bom 569 : 82 IC 966 : AIR 1924 PC 209.

21 *Mata Badal v Bijay Bahadur*, AIR 1956 All 707; *Nakchhed Singh v Bejay Bahadur*, AIR 1953 All 759 : (1953) ALJ 609.

22 *Kenchava v Girimallappa*, (*supra*).

23 *Gangu v Chandrabhagabai*, (1908) 32 Bom 275.

24 *Adiveppa v Veer Bhadrappa*, (1947) Bom 518.

25 *Bakubai v Manchhabai*, (1864) 2 Bom 5.

§ 101. Effect of disability.—Where an heir is disqualified, the next heir of the deceased succeeds as if the disqualified person were dead.[26] The disqualified person transmits no interest to his heir.[27]

Illustrations

(a) *A* dies leaving an insane son and a daughter. The daughter will take the inheritance as if the son were dead.

(b) *A* dies leaving two brothers *B* and *C*. *C* is insane and has a son *D*. *B* alone will inherit, for *D* is the nephew of the deceased, and a nephew cannot inherit while a brother is in existence.

§ 102. Disqualification only personal.—The disability is purely personal, and does not extend to the legitimate issue of the disqualified heir.[28] Nor does it extend in cases governed by the Bombay School of Hindu law, to his wife or widow.[29] However, adopted sons of disqualified heirs are not entitled to this heritable right.[30]

Illustrations

(a) *A* dies leaving a son *B* who is insane from birth, and a grandson by *B*. The grandson will succeed to *A* as *A*'s heir.

(b) *A* dies leaving a son *B* who is an idiot, a grandson, who is the adopted son of *B* and a daughter. The daughter will inherit *A*'s estate. A son adopted by a disqualified heir is not entitled to succession.

(c) A Hindu governed by the Bombay School of Hindu law, dies leaving as his only heir, a brother who is disqualified from inheriting, and the brother's wife. The brother's wife inherits to the deceased, though the brother is disqualified. (See §§ 64 and 68).

§ 103. Disability arising after succession.—Property that has once vested in a person by inheritance is not divested by a subsequently supervening disability.[31]

§ 104. Removal of disability after succession has opened.—Where the disability is removed subsequent to the opening of the inheritance, the right to inheritance revives, but not so as to divest the estate already vested in another person.[32]

Illustrations

(a) *A* dies leaving a son who is insane, and a widow. On *A*'s death the widow succeeds to the estate as his heir. The son's insanity is cured during the widow's life. The estate being vested in the widow, the son is not entitled to it during her lifetime. After the widow's death, however, the son as the nearest heir of *A*, is entitled to succeed to the estate, so that if *A* has left a brother also, the son, and not the brother will succeed.

(b) *A* dies leaving a son *X*, who is insane and a brother *B*. On *A*'s death, *B* succeeds to the estate. The lunacy is cured during *B*'s lifetime, *X* cannot recover the estate from *B*, for it is vested in *B*. Also, on *B*'s death, the estate will pass to *B*'s heirs, and not to *X*, for *B* took as full owner, so that if *B* dies leaving a son, it will pass to his son. However, if *B* leaves no other heir

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26 *Baboo Bodhnarain v Omreo,* (1870) 13 MIA 520.
27 *Musst Budha Koer v Musst Sohodra Kuer,* (1931) 11 Pat 35 : 132 IC 865 : AIR 1991 Pat 267.
28 *Mitakshara,* Chapter II, section 10.
29 *Gangu v Chandrabhagabai,* (1908) 32 Bom 275.
30 *Mitakshara,* Chapter II, section 10, para 11.
31 *Deo Kishen v Budh Prakash,* (1883) 5 All 509 (FB); *Skhu v Puttamma,* (1891) 14 Mad 289, 294; *Abilakh v Bhekhi,* (1895) 22 Cal 864.
32 *Mitakshara,* Chapter II, section 7; *Dev Kishen v Budh Prakash,* (1883) 5 All 509 (FB).

than *X* (his brother's son), *X* will succeed to the estate, not as the heir of *A*, but as the heir of *B*, the result is that where the estate of the father has passed to a full owner, a son whose disability has been removed, cannot claim it as his father's heir, and he loses all his rights to it as such. It is different however, where the estate has passed to a widow or other limited heir, who takes only a widow's interest as in Illustration (a).

§ 105. After-born son of disqualified heir.—Where, after the succession has opened, a son is born to a disqualified heir, the son is not entitled to inherit so as to divest the estate already vested in another.[33]

Illustration

A dies leaving a son *B* who is insane, a widow, and a nephew. On *A*'s death, the widow inherits the estate. The widow then dies, and the nephew succeeds to the estate as *A*'s heir. A son *C*, is then born to *B*, and he claims the estate from the nephew. He is not entitled to the estate, for it became vested in the nephew on the death of the widow.

Exclusion from Partition

§ 106. Disability and partition.—Disability, which excludes a person from inheritance also, excludes him from a share of the joint family property on partition.[34] Where a member of a joint family had no congenital disqualification and therefore had acquired by birth an interest in the joint family property, a later supervening disqualification, while it might debar him from claiming a partition, would not prevent him from acquiring the whole property by survivorship.[35] A Full Bench in Madras has held that even when the disqualification is congenital, the same result follows.[36] There may be such a severance of the joint status as would put an end to the right of succession by survivorship.[37] However, if the other coparceners separate their shares and disrupt the joint family, the lunatic member may become a separate owner of his share.[38]

§ 107. Lunacy and partition.—The High Court of Calcutta[39] held that a member of a joint family, who was not born a lunatic but is a lunatic at the time of partition, is not entitled to claim his share by partition. This is also the opinion of the High Court of Allahabad.[40]

The Federal Court of India examined the law on the point and held that, although a person who is insane at the time when partition takes place, cannot claim a share in the joint family properties, yet the texts of Hindu law makes it clear that his rights remain in abeyance and are revived on the malady being cured. A coparcener, on his supervening insanity, may not exercise his will to effect a severance of the status; but

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33 *Kalidas v Krishna,* (1869) 2 Ben LR 103 (FB); *Deo Kishen v Budh Prakash,* (1883) 5 All 509 (FB); *Pawadewa v Venkatesh,* (1908) 32 Bom 455.

34 *Ram Sahye v Lalla Laljee,* (1882) 8 Cal 149; *Ram Soonder v Ram Sahye,* (1882) 8 Cal 919.

35 *Muthusami v Meenammal,* (1902) 43 Mad 464 : 55 IC 576; *Mt Dilraj Kuari v Rikheswar Ramdube,* (1934) 13 Pat 712 : 151 IC 419 : AIR 1934 Pat 373 (lunacy); *Moolchand v Chahta Devi,* (1937) All 825 : 170 IC 833 : AIR 1927 All 605 (FB) (leprosy).

36 *Kesava v Govindan,* 1946 Mad 452 (FB).

37 *Venkatewara v Mankayammal,* (1935) 69 Mad LJ 410 : AIR 1935 Mad 775.

38 § 98. *Bhagwati Saran Singh v Parmeshwari Nadan Singh,* (1942) All 518 : 202 IC 227 : AIR 1942 All 267 affirmed in *Rameshwari v Bhagawati,* (1949) 11 FCR 715.

39 *Ram Sahye v Lalla Laljee,* (1882) 8 Cal 149 : (1882) 8 Cal 919.

40 *Bhagwati Sran Singh v Parmeshwari,* (1942) All 518 : 202 IC 227 : AIR 1942 All 267.

that does not prevent the other coparceners from disrupting the coparcenery, if they so choose, and these rights can be exercised even if the family consist only of one sane and one insane member.[41]

Under the Hindu Inheritance (Removal of Disabilities) Act, 1928 such a person not having been a lunatic from birth is entitled to a share. It has been held that by virtue of the operation of this Act, a suit by a next friend of a coparcener of unsound mind to enforce partition is maintainable.[42]

§ 108. Removal of disability reopens partition.—A coparcener, who is excluded from a share on partition, by reason of a disability, is entitled, on removal of the disability, to the same rights as a son born after partition.[43]

§ 109. A disqualified coparcener having sons.—Where a son is born to a disqualified coparcener, after the death of the ancestor, he is not, according to the Bombay decisions,[44] entitled to take a share by divesting the coparcener in whom the ancestor's share vested on his death. The High Court of Madras has arrived at a contrary conclusion.[45] Following the principle of this decision, the same High Court has held that an idiot (even where the idiocy is congenital), who marries and has children, is a coparcener with his father (though he cannot claim a share by partition) and that a Will executed by the father during the lifetime of the son is invalid.[46] The Supreme Court has confirmed the latter view.[47]

A, his son *B*, and his brother *C*, are members of a *Mitakshara* joint family. *B* is insane. *A* dies, and on his death, his undivided coparcenery interest passes to his brother *C* by survivorship. After *A*'s death, a son is born to *B*. *B*'s son sues *C* to recover the half-share of his grandfather *A* in the joint family property. He is entitled to the share.

Under *Mitakshara* law, as applied in Madras prior to the coming into operation of the Hindu Inheritance (Removal of Disabilities) Act, 1928, the Supreme Court held that a disqualified heir who was congenitally a deaf-mute, became by birth a coparcener with his father and on the death of his father, without other male issue, ancestral property vested in him as the sole surviving coparcener.

Miscellaneous

§ 110. Maintenance of disqualified heirs.—Where a person is excluded from inheritance on account of a disability, he, and his wife and children, are entitled to maintenance out of the property which he would have inherited but for the disability and where he is excluded from a share on partition, he and his wife and his children are entitled to have a provision made for their maintenance out of the joint family property.[48]

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41 *Rameshwari Nadan v Bhagwati,* (1949) 11 FCR 715 : AIR 1950 FC 142.
42 *Vedavyas Rao v Naraynan Rao,* AIR 1962 Mys 18; reference may also be made to *Parameshwaram v Parameswaram,* AIR 1961 Mad 345; *Pakkiriswamy v Krishnaswamy,* AIR 1973 Mad 36.
43 § 310; *Mitakshara,* Chapter II section 10, paras 6–7.
44 *Bapuji v Pandurang,* (1882) 6 Bom 616; *Pawadewa v Venkatesh,* (1908) 32 Bom 455.
45 *Krishna v Sami,* (1886) 9 Mad 64 (FB).
46 *Amrithammal v Vallimayil Ammal,* (1942) Mad 807 : 203 IC 648 : AIR 1942 Mad 693 : (1992) 2 MLJ 292.
47 *Kamalammal v Venkatalakshmi,* AIR 1965 SC 1349.
48 *Ram Sahye v Lalla Laljee,* (1882) 8 Cal 149; *Ram Soonder v Ram Sahye,* (1882) 8 Cal 919; *Mitakshara,* Chapter II, section 10.

§ 111. Adoption of religious order.—Where a person enters into a religious order renouncing all worldly affairs, his action is tantamount to civil death, and it excludes him altogether from inheritance and from a share on partition.[49]

All property, which belongs to such a person at the time of renunciation, passes immediately on his renunciation to his heirs, but property acquired by him subsequent to the renunciation, passes to his spiritual heirs (§ 58). A person does not become a *sanyasi* by merely declaring himself a *sanyasi* or by wearing clothes ordinarily worn by a *sanyasi*. He must perform the ceremonies necessary for entering the class of *sanyasis*, without such ceremonies, he cannot become dead to the world.[50]

Sudras.—According to the orthodox *Smriti* writers, a *Sudra* cannot legitimately enter into a religious order.[51] Although, the strict view does not sanction or tolerate ascetic life of the *Sudras*, it cannot be denied that the existing practice all over India is quite contrary to such orthodox view and any such usage would be given effect to by the court.[52] In cases, therefore, where any usage is established, according to which a *Sudra* can enter into a religious order in the same ways, as in case of the twice-born classes, such usage would be given effect to by the court.[53]

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49 *Teeluck v Shama,* (1964) 1 WR 209; *Avadesh Kumar v Shiv Shankar,* AIR 1985 All 104 (modes of proof).

50 *Bladeo Prasad v Arya Priti Nidhi Sabha,* (1930) 52 All 789 : 124 IC 761 : AIR 1930 All 643; *Kondal Row v Swamulavaru,* (1917) 33 Mad LJ 63 : 40 IC 535 : AIR 1918 Mad 402; *Ramdhan v Dalmir,* (1909) 14 CWN 191 : 2 IC 385; *Satynarayana v HRE Board,* AIR 1957 AP 824; *Rammakrishan Rao v Srinivasarao,* AIR 1960 AP 449; *Madhusudhan v Gobind,* AIR 1965 Ori 54, reference may also be made to the decision of the Supreme Court in *Krishna Singh v Mathura Ahir,* AIR 1972 All 273; *Babu Lal v Moti Lal,* AIR 1984 All 378 (not heard of for more than 30 years); *Ramchandra v Balla Singh,* AIR 1986 All 193.

51 *Harish Chandra v Atir Mahmud,* (1913) 40 Cal 545 : 18 IC 474; *Somasundram v Vaithilinga,* (1917) 40 Mad 846 : 41 IC 546 : AIR 1918 Mad 794.

52 *Shri Krishna Singh v Mathura Ahir,* AIR 1972 All 273.

53 *Shri Krishna Singh v Mathura Ahir,* AIR 1980 SC 707 : (1980) 2 SCR 660.

CHAPTER XII

JOINT HINDU FAMILY COPARCENERS AND COPARCENARY PROPERTY— MITAKSHARA LAW

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Note. — The joint Hindu family as an institution is peculiar to Hindu jurisprudence and has its origins in ancient orthodox texts and writings. Though it originated in the propagation of the theory of conferring upon the father nearly absolute authority, however, by efflux of time, the system was considerably whittled down so as to confer equal rights on the sons by birth. The induction of coparceners by birth into the family considerably reduced the absolute power of the father. Several other inroads into such unitary rights and privileges of the father, in which incursions had to be made with the growth of society and the appreciation of the value of individual rights, resulted in the

enlargement of the body constituting the joint Hindu family. This body which is a creature of law took within its fold the lineal male descendants of a common ancestor and included their mothers, wives or widows and unmarried daughters. Joint family status is ordinarily the result of birth or affiliation by adoption or marriage and need not necessarily be associated with the possession of joint family property. All the members constituting the family did not, however, possess equal rights in the coparcenary, such as the daughters. The development of the personal law applicable to Hindus has been from time to time refined, prompted by judicial precedents and also legislations such as The Hindu Succession Act, 1956 which has from time to time, expanded and broadened the scope of its applicability. The passing of the amendments to the Hindu Succession Act in 2005 merited and conferred equality of status to the daughters as coparceners, thus paving the way for inclusive application of the law, but now in an attenuated form. The progression of the Hindu law has therefore demonstrated it as being reformist and not being averse to adapting itself to neoteric situations, seeking to blend the ancient with the contemporary, resulting in adaption to extant situations in modern society and redeeming itself from becoming archaic and stunted.

The Hindu Succession Act, 1956, has brought about some radical changes in the law of succession without abolishing the joint family and joint family property. It does not interfere with the special rights of those who are members of a *Mitakshara* coparcenary. It is, however, essential to note that section 6 of that enactment recognises the rights upon the death of coparcener of certain of his preferential heirs to claim an interest in the property that would have been allotted to him if there had in fact been a partition immediately before his death. Section 6 of the Hindu Succession Act as it stood, has been amended by the Hindu Succession (Amendment) Act, 2005. Far reaching and sweeping changes have been affected by the inclusion of daughters in the *Mitakshara* coparcenary, who would enjoy equal rights with the sons. The ensuing commentary will thus have to be read keeping in mind such inclusion. Attention is invited to the commentary under the amended section 6 of that Act.

The cardinal doctrine of *Mitakshara* law that property inherited by a Hindu from his father, father's father, or father's father's father is ancestral property (unobstructed heritage) as regards his own male issue, that if his son, grandson and great-grandson acquire an interest in it from the moment of their birth and they become coparceners with their paternal ancestor in such property immediately on their birth has been vitally affected by section 8 of that Act. Another doctrine of *Mitakshara* law, that a coparcener in a joint family cannot make a valid gift or bequest of his interest in the coparcenary property so as to defeat the right of the other members to take by survivorship, is partly abolished to the extent that it is now competent to such a coparcener to dispose of by will (section 30) his undivided interest in the coparcenary property. See sections 6, 8 and 30 of that Act and notes thereunder for the extensive and far reaching effect of the new legislation upon the subject after that Act came into force.

This chapter has been discussed under the following heads:

I. Coparceners—§§ 210–215A.
II. Coparcenary property—§§ 216–232A.
III. Management and enjoyment of coparcenary property—§§ 233–252.
IV. Alienation of coparcenary property—§§ 253–255.
V. Alienation of undivided coparcenary interest—§§ 256–264.
VI. Setting aside alienations—§§ 265–269.